758

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 896.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT E. HARRIS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 29, 1895.

(15,780.)

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Judd & Detweiler, Printers, Washington, D. C., March 5, 1895.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the May term, A. D. 1894, thereof, begun and held at the city of St. Paul, Minnesota, in the eighth circuit, on the first Monday in May, it being the seventh day of May, A. D. 1894, before the Honorable Henry C. Caldwell, the Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the second day of April, A. D. 1894, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Colorado, in a certain cause wherein The Union Pacific Railway Company is plaintiff in error and Robert E. Harris defendant in error, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the words following, to wit:

2 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered that heretofore and on to wit, the 26th day of November, A. D. 1892, came Robert E. Harris, by Messrs. Felker and Dayton his attorneys, and filed in said court his complaint, and sued out of and under the seal of said court a writ of summons, against the Union Pacific Railway Company.

And the said complaint is in words and figures as follows, to wit:

Complaint.

In the Circuit Court of the United States for the District of Colorado.

ROBERT E. HARRIS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Robert E. Harris, plaintiff, who is a citizen of the State of Colorado, by his attorneys Felker & Dayton, complains of The Union Pacific Railway Company, defendant, which was heretofore and now is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the city of Omaha and State of Nebraska, and is now and was at the time and times hereinafter stated, a citizen of the State of Nebraska, for that, whereas, the said defendant, at the time and times hereinafter set forth owned and operated a certain railroad extending from the city of Georgetown in the county of Clear Creek, through the county of Jefferson to the city of Denver in the county of Arapahoe, all in the State of Colorado, and was at the time and times hereinafter set forth engaged in the business of a common carrier of passengers for hire over, upon and along its said line of railroad.

And plaintiff avers, that on the thirtieth day of July, A. D. 1892, this plaintiff was a passenger for hire upon one of the said defendant's railway coaches, in a train of cars with a locomotive then and there being operated and conducted by the said defendant company, its agents and servants, between the said city of Georgetown and the said city of Denver, and by the terms of his said contract of passage, the said defendant company was bound to deliver this plaintiff safely at the said city of Denver, and the said defendant in that behalf undertook to carry and convey said plaintiff in safety 2½ from thence to his place of destination at the city of Denver aforesaid, and to use due care and diligence in and about carrying and conveying him thereto; that defendant not regarding its undertaking and promise aforesaid, and in utter disregard of its duty in that behalf, carelessly, improperly, negligently and unskillfully operated and managed its said train of cars and its said freight cars improperly and unsafely standing upon the side track hereinafter mentioned, to the great damage and injury of this plaintiff, in that to wit, that during said passage and after the said train had left the city of Idaho Springs in said county of Clear Creek, at a point about two miles easterly therefrom, at a place known as Silver Age Mill siding, the said defendant company had standing upon its side track then and there being at the place last aforesaid, one or more freight cars, which, as plaintiff is informed and verily believes, were by the said company left insecure and unsafe and in such a position and condition as to interfere with the passage of the train of cars upon which this plaintiff then and there had passage along the main line of said defendant company's track; that said defendant company by its servants and agents in charge of said passenger train, was running the same on said main line, and passed said switch track at a high and dangerous rate of speed, and that owing to the unsafe condition of the said freight cars upon the aforesaid siding, and the careless and negligent manner of said defendant and its agents and servants in leaving its said freight cars in such unsafe condition upon said siding, and also owing to the careless and negligent management of the said defendant company and its servants and agents in operating said passenger train at said siding, the said freight cars and the coach in the said passenger train in which this plaintiff was then and there riding and had passage thereon as aforesaid, came in collision with each other, and then and there tore the said passenger coach into pieces and threw the same off from the track of said defendant's railroad, by means of which the said plaintiff was thrown from the said coach into Clear creek, a stream of water running by the side of said defendant company's railroad at the siding aforesaid, by reason of which this plaintiff was then and there struck with great force and violence upon the back

and side by fragments of the said car and by being thrown upon the rocks in said stream, whereby he became injured in the back, side and other portions of his body, and then and there received great bruises, hurts and wounds, which caused this plaintiff great pain and suffering for a long space of time and caused this plaintiff to be confined to his bed for three months and upwards thereafter; that said injuries so received
as aforesaid, has occasioned and been the means of caus-
3 ing a disease known by the name of paralysis agitans,
or a shaking palsy in all of his limbs, whereby the said plaintiff has become and is incapacitated from attending to his daily avocations, and which said injuries and disease aforesaid, as plaintiff is informed by his medical attendants, and verily believes, will greatly shorten his life, and by means of which injury this plaintiff has ever since receiving the same as aforesaid, suffered great pain and still continues to suffer great pain and from hence ever will suffer great pain and paralysis of the limbs and body of this plaintiff; and that plaintiff by means of said injuries has been hindered and prevented from carrying on, transacting and proceeding in his lawful, ordinary and necessary affairs and business by him heretofore performed and transacted, and thereby has lost divers and great gains and profits which had been accustomed to arise and accrue to this plaintiff from the transacting and carrying on of the same; and also by means of the premises aforesaid the said plaintiff has been and is now forced and obliged to pay, lay out and expend large sums of money in and about endeavoring to be cured of his said injuries, to wit, in the sum of one thousand dollars ($1,000), all to the damage of this plaintiff in the sum of fifty thousand dollars ($50,000).

Wherefore, plaintiff demands judgment against said defendant in the sum of fifty thousand dollars ($50,000), together with the costs by this plaintiff sustained in this action.

FELKER & DAYTON,
Plaintiff's Attorneys, 48–50 *Good Block*.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Robert E. Harris, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

R. E. HARRIS.

Subscribed and sworn to before me, this 26th day of November, A. D. 1892.

[SEAL.]

CHAS. KNOCH,
Notary Public.

My commission expires March 13th, 1895.

Indorsed: 2865. In the circuit court of the United States for the district of Colorado. Robert E. Harris, plaintiff, *vs.* The Union Pacific Railway Company, defendant. Complaint. Filed Nov. 26, 1892. Robert Bailey, clerk. Felker & Dayton, plaintiff's attorneys, 48-50 Good block.

4 *Complaint.*

Filed in the clerk's office this 26th day of November, A. D. 1892.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

ROBERT E. HARRIS, Plaintiff,
versus
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The President of the United States of America to the above-named defendant, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court, by Robert E. Harris plaintiff against you as defendant to recover the sum of $50,000—due from you the said defendant to the said plaintiff, as damages sustained by the said plaintiff on the 30th day of July 1892 at Silver Age Mill siding in said district, while being transported as a passenger on the cars of the defendant between the city of Georgetown and the city of Denver in said district—as more particularly set forth and described in the complaint filed herein and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the [SEAL.] said circuit court, at the city of Denver, in said district, this 26th day of November, A. D. 1892, and of the Independence of the United States the 117th year.

ROBERT BAILEY, *Clerk.*

5 *Proof of Service.*

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

DENVER, *December* 1*st, A. D.* 1892.

I hereby certify, that I received the within writ on the 26th day of November, A. D. 1892, and that I have personally served the same upon the said defendant The Union Pacific Railway Company by delivering to W. A. Deuel general superintendent of said company personally, a true copy of the within writ, at the time and place as follows: As to W. A. Deuel general sup't by leaving a true copy of the within writ at his office, with E. R. Griffen his chief clerk, at Denver Arapahoe county this 1st day of December A. D. 1892.

This writ therefore, returned executed as the law directs, this 1st day of December A. D. 1892.

A. H. JONES, *Marshal,*
By J. S. WARWICK,
Deputy Marshal.

Marshal's Fees.

Service 1 defendants, at $2	$2 00
Mileage 1 miles at 6c. going only	06
Total	$2 06

Indorsed: No. 2865. Circuit court of the United States for the district of Colorado. Robert E. Harris plaintiff *versus* The Union Pacific Railway Company defendant. Summons. Filed this 1st day of December A. D. 1892. Robert Bailey clerk. Dayton & Felker of Denver attorneys for plaintiff.

Action for Damages.

36th Day, November Term.

THURSDAY, *December* 22*d, A. D.* 1892.

ROBERT E. HARRIS }
vs. } 2865.
THE UNION PACIFIC RAILWAY COMPANY. }

At this day comes the said plaintiff by W. L. Dayton Esquire his attorney and the said defendant by Willard Teller Esquire its attorney also comes.

And thereupon it is ordered by the court, that said defendant answer herein, within twenty (20) days from this day.

6 *Answer to Complaint.*

In the Circuit Court of the United States, District of Colorado.

ROBERT E. HARRIS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 2865.

Now comes the said defendant, and says, that as to whether the said plaintiff was, at the time mentioned, a passenger on the train of this defendant, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

This defendant, further answering, denies that it carelessly, improperly, negligently or unskillfully operated and managed its train of passenger cars, or its train of freight cars, or improperly or unsafely left any cars standing upon a side track, to the damage or injury of the said plaintiff or otherwise.

This defendant admits that it had standing upon its side track, at about the place mentioned in said complaint, one or more freight cars; but denies that the said freight cars were left insecure or unsafe, or in such a position as to interfere with the passage of the train of cars upon which this plaintiff was riding, or with any other cars whatever.

This defendant denies that the said passenger train was, at the time mentioned in the said complaint, running at a high or dangerous rate of speed, and denies that, owing to the unsafe condition of the said freight cars, or the carelessness, negligence and want of care of the defendant and its agents, in leaving freight cars upon said siding, the said plaintiff was, in any manner, injured, and denies that owing to the careless and negligent manner of the conductor, or of its servants or agents, in operating said passenger train, or any other train of cars, the said freight cars and coach in said passenger train, came in collision with each other, and denies that by reason of any negligent act of the said defendant, or of its servants, agents or employés, the said passenger car was torn into pieces, or thrown off the track, or in any manner injured, and denies that by any negligent act of defendant, its servants, agents or employés, either of omission or commission, the said plaintiff was at any time, injured in any manner whatever, and denies that by reason of any negligence of the said defendant, the said plaintiff has received injuries causing a disease known as paralysis agitans or shaking palsy, or any disease whatever. Denies that plaintiff has suffered any damage or injury through or on account of any
7 negligence on the part of the said defendant, its officers, agents or employés, at any time or place.

Wherefore, defendant prays to be dismissed, and to recover its costs in this behalf expended.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Willard Teller, being first duly sworn, on his oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the above and foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best knowledge, information and belief of affiant.

WILLARD TELLER.

Subscribed and sworn to before me this 11th day of January, 1893.

C. M. SPERRY,
Notary Public.

[SEAL.]

Com. ex. 1–25–93.

Indorsed: No. 2865. Circuit court. Robert E. Harris *vs.* The Union Pacific Railway Company. Answer to complaint. Filed Jan'y 11, 1893. Robert Bailey, clerk. Teller, Orahood & Morgan, attorneys for def't.

Supplemental Answer.

In the Circuit Court of the United States, District of Colorado.

ROBERT E. HARRIS, Plaintiff, }
vs. } No. 2865.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. }

Now comes said defendant, The Union Pacific Railway Company, and for a further answer in said cause, not waiving any answer heretofore filed, says, that heretofore, to wit, on the 4th day of August, A. D. 1892, the said plaintiff herein, for a good and valuable consideration then and there paid by the said defendant herein, to wit, the sum of two hundred and fifty dollars, made, executed and delivered to said defendant his release, in writing, in full settlement of all claims against the Union Pacific, Denver & Gulf Railway Company on account of the injuries set forth in said complaint, and then and there released the said defendant from any and all claims of every kind and nature, and also released any and all railroads and railroad companies operated, leased and controlled by said The Union Pacific Railway Company, and any and all claims which the said plaintiff had at that time, or ever had against said The Union Pacific Railway Company, or any of the leased lines or lines operated by the said company.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant.

Indorsed: No. 2865. Circuit court. Robert E. Harris *vs.* The Union Pacific Railway Company. Supplemental answer. Filed July 8, 1893. Robert Bailey, clerk. Teller, Orahood & Morgan, attorneys for def't.

Action for Damages.

35th Day, May Term.

Saturday, *July 8th, A. D.* 1892.

Robert E. Harris
vs.
The Union Pacific Railway Company. } 2865.

At this day comes the said plaintiff by W. B. Felker Esq. his attorney, and the said defendant by Willard Teller Esq. its attorney also comes.

And thereupon on motion of the said defendant it is ordered by the court, that it have leave to file an additional answer herein.

And thereupon it is ordered by the court, that the plaintiff file his replication to the said additional answer, within three days from this day.

Reply.

In the Circuit Court of the United States for the District of Colorado.

Robert E. Harris, Plaintiff,
vs.
The Union Pacific Railway Company, Defendant. }

Now comes the plaintiff, by his attorneys Felker & Dayton, and replying to defendant's second or supplemental answer filed herein, denies each and every allegation therein contained.

Further replying to the aforesaid answer, plaintiff avers, that at the time of the execution of the instrument hereinafter referred to, and for a long time thereafter, to wit, for the space of five weeks, this plaintiff was confined to his bed on account of the injuries received as set forth in his complaint in this action, and during all of said time was suffering great pain and had not recovered 9 from the shock of his injuries, and that he was continually under the influence of opiates administered to him by his physician; by means of which premises plaintiff's mind was, during all of said time, weak, confused, dazed, and irrational to such an extent that he did not know what he was doing, and could not and did not realize his situation, and was then and there incapable of understanding or comprehending what he then and there did or might do, and was then and there wholly incapable, both mentally and physically, of carrying on or transacting any business whatsoever.

Plaintiff further replying to said answer, alleges, that immediately after the happening of the said injuries, to wit, on the 30th day of July, A. D. 1892, he was brought home and placed under the care and charge of his physician, one T. A. Hughes, who, as his pro-

fessional adviser, on account of the seriousness of plaintiff's injuries both to mind and body, gave explicit instructions to the family and nurse attending plaintiff, that no person be admitted into the presence of plaintiff in his sick-room, except those in personal attendance upon him; that after said instructions had been given, and while the same remained operative, one William Hussey, the claim agent of defendant company, immediately after the happening of said injuries, came to the house of this plaintiff and insisted upon admittance to the bed chamber of this plaintiff; that he was then and there informed of the serious illness of plaintiff, and of the physician's instructions aforesaid, but, notwithstanding, said claim agent persisted in seeing said plaintiff, and forced himself into the sick chamber of said plaintiff, and then and there, although repeatedly told by the attendants waiting upon plaintiff, not to disturb or interfere with plaintiff, persisted in talking to plaintiff in regard to his injuries and the non-liability of defendant company whom he represented, and then and there importuned plaintiff to accept the assistance of defendant company in paying the expenses of his sickness, and loss of time; that said claim agent then and there, with intent to deceive plaintiff, falsely and fraudulently represented to him that defendant company whom he represented, was not responsible for the collision which occasioned plaintiff's injuries, and which is set forth in plaintiff's said complaint, and was not in any manner liable for damages to plaintiff on account thereof, but that the Silver Age Mining & Milling Company, whose building was located along the side track mentioned in plaintiff's complaint, was in the control of the switch track and freight car mentioned in plaintiff's complaint, and that the negligence of the employés
10 of said mining & milling company solely caused the collision mentioned in plaintiff's complaint, and that said mining and milling company was solely liable in damages to the plaintiff for the injuries he had thereby and therein received; that said claim agent then and there with intent to deceive plaintiff, further falsely and fraudulently represented to plaintiff that his physician, the said Dr. T. A. Hughes, did inform him, the said claim agent, that his injuries were not serious and that he would be up and around and well as ever within two weeks; and then and there in the presence of plaintiff, reckoned up what it would cost for medical services, for expense of sickness and loss of time of plaintiff for said two weeks of his sickness, and then and there represented to plaintiff that he was willing in behalf of his said company to pay all of the said expenses and loss of time, and that two hundred and fifty dollars would cover the whole thereof; and further represented, that while defendant company was not liable in any manner to pay such expenses, that his said company was willing to give the plaintiff the sum of two hundred and fifty dollars as a gratuity and to assist him in his said two weeks of sickness; that plaintiff, relying upon the truth of the aforesaid representations of the said claim agent, did accept said sum of two hundred and fifty dollars for the purposes aforesaid, and for no other purpose or object whatsoever; that said claim agent upon giving this plaintiff such sum of money aforesaid,

presented a paper-writing for plaintiff to sign; that plaintiff was unable, on account of his said sickness and mental condition, to read the same and did not read the same, neither was the said paper-writing read to this plaintiff, and plaintiff at the time of signing the same had no knowledge of its contents further than to suppose that it was a receipt for the $250 to cover the expenses of his sickness and loss of time for the two weeks which said claim agent represented that plaintiff's said doctor told him he would be unable to do any business; that all of the representations of said claim agent to plaintiff in regard to the non-liability of defendant company and the liability of said mining and milling company, and all of the representations then and there made by said claim agent as to the length of time plaintiff would be disabled by cause of his injuries as hereinbefore set forth, and all other representations then and there made by said claim agent to induce him to sign said paper-writing, were wholly and absolutely false, untrue, and made by said claim agent with the intent to deceive, cheat, and defraud plaintiff into signing away his right of action against the said defendant com-
pany; that by reason of plaintiff's condition of mind as here-
11 inbefore set forth, plaintiff was not then and there able to
read the said paper writing, and was not competent to understand the force and effect of the said paper-writing had the same been read and fully explained to him.

Plaintiff further replying, alleges, that if the release set up in defendant's said amended or supplemental answer is the same paper-writing or instrument signed by plaintiff as aforesaid, that the same was obtained by unfair advantage and while plaintiff was incapacitated as aforesaid to make and execute the same, and that plaintiff was induced to sign the paper-writing under a misapprehension of its contents, and upon the faith and truth of the false and fraudulent representations aforesaid, and in fraud of plaintiff's rights, and that the said instrument, beyond being a receipt for two hundred and fifty dollars for expense of sickness and loss of time for the space of two weeks from the date of receiving his said injuries, is fraudulent, void and of no effect.

Wherefore, plaintiff demands judgment as prayed for in his complaint in this action, less the sum of two hundred and fifty dollars for the expense of plaintiff's sickness and loss of time for the space of two weeks from the time of the happening of the injuries alleged in his complaint in this action.

FELKER & DAYTON,
Plaintiff's Attorneys, 48–50 *Good Block.*

Indorsed: Orig. No. 2865. In the circuit court of the United States for the district of Colorado. Robert E. Harris, plaintiff, *vs.* The Union Pacific Railway Company, defendant. Reply. Filed Jul. 11, 1893. Robert Bailey, clerk U. S. circuit court. Felker & Dayton, plaintiff's attorneys, 48–50 Good Block.

Action for Damages.

60th Day, May Term.

FRIDAY, *July 14th, A. D.* 1893.

ROBERT E. HARRIS
vs. } 2865.
THE UNION PACIFIC RAILWAY COMPANY.

At this day comes the said plaintiff by W. B. Felker Esq. his attorney and the said defendant by Willard Teller Esq. its attorney also comes.

And thereupon comes a jury, to wit:

Frank Miller, Merritt Owen, James L. Chatfield, F. C. Albrecht, Samuel Blair, George Champion, C. T. Limberg, William 12 Brown, George W. Thompson, George E. Truax, C. W. Tuckerman, Mark L. Sterling, twelve good and lawful men and they are duly selected and tried, impannelled and sworn to well and truly try the matter at issue herein joined, between the parties to this cause and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves or with others, touching this cause or the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation by others are permitted to retire to meet the court at its next incoming.

Action for Damages.

61st Day, May Term.

SATURDAY, *July 15th, A. D.* 1893.

ROBERT E. HARRIS
vs. } 2865.
THE UNION PACIFIC RAILWAY COMPANY.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here, present and in the jury-box the trial herein is resumed and continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation by others are permitted to retire, to meet the court at its next incoming.

Action for Damages.

62d Day, May Term.

Monday, *July 17th, A. D.* 1893.

Robert E. Harris
vs. } 2865.
The Union Pacific Railway Company.

At this day come again the said parties by their attorneys respectively and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

13 And afterwards and on this day come again the said jurors and on their oaths do say, they find for the plaintiff in the sum of sixty-seven hundred and fifty dollars ($6,750) less amount paid two hundred and fifty dollars ($250) balance due sixty-five hundred dollars ($6,500).

Action for Damages.

71st Day, May Term.

Wednesday, *August 23d, A. D.* 1893.

Robert E. Harris
vs. } 2865.
The Union Pacific Railway Company.

The motion for a new trial herein, having heretofore come on to be heard and having been submitted to the court upon briefs, Mr. W. B. Felker appearing as attorney for the said plaintiff and Mr. Willard Teller appearing as attorney for the said defendant, and by the court taken under advisement and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing that the said motion be denied.

It is therefore considered by the court that judgment be entered upon the verdict of the jury herein, in favor of the said plaintiff and against the said defendant, for the said sum of six thousand five hundred dollars ($6,500) and the said plaintiff's costs to be taxed.

And day until sixty (60) days from this day is allowed the said defendant within which time to file a bill of the exceptions reserved by it upon the trial of the issues herein joined.

And supersedeas bond upon writ of error will be in the sum of eight thousand dollars ($8,000).

Action for Damages.

WEDNESDAY, *August 23rd, A. D.* 1893.

ROBERT E. HARRIS
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2865.

On this 23d day of August, A. D. 1893, the same being one of the regular juridical days of the August term A. D. 1893, there being present the Honorable Moses Hallett, district judge,

It is considered by the court that the said plaintiff do have and recover of and from the said defendant six thousand five 14 hundred dollars ($6,500) his damages by occasion of the premises in his complaint mentioned, in form aforesaid assessed, and his costs by him in this behalf laid out and expended to be taxed, and have execution therefor.

Bill of Exceptions.

In the Circuit Court of the United States, District of Colorado.

ROBERT E. HARRIS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 2865.

Be it remembered that heretofore, to wit: on the 14th day of July, 1893, this cause came on to be heard, it being in the May term of said court, said cause coming on for trial before said court, the Honorable Moses Hallett, judge of said court, and a jury:

The plaintiff, to maintain the issues on his part, offered evidence as follows:

JOHN M. ODENHEIMER, being called as a witness, and first duly sworn, gave evidence tending to show that he had inspected the ground where the accident had happened, and had made a map of thereof, together with the grade of the main siding or switch, and that the said map or diagram was substantially correct, and that the switch was upgrade from the main track; that the length of the siding was 300 feet, and the grade of the main track was two and three-tenths per cent.; that the side track and the main track were nearly parallel with each other, and that the siding connected with the main track, and the grade of the siding for about 268 feet was about two and one-tenth per cent.; that the mark on the map, "Silver Age," was a post with the words, "Silver Age" on it; that no station-house was there, and that the cars would have to be about 60 feet from the switch or frog before they would clear—that would be 22 feet from the frog.

Plaintiff also offered said map in evidence, and the same was accepted.

Plaintiff also introduced as a witness Mr. Cole who gave evidence tending to show that he was on the train and in the smoking car, and that the train was struck by a flat car standing at the frog or switch, and that the observation car was thrown over on its side, and the coach in front partly turned over; that the train was going at ordinary speed, and there had been no slacking of speed before the collision; that he helped a man out of the creek after the collision, but could not say who it was, and that the flat car collided with the tender, and from thence with each car.

15 The plaintiff also introduced Mr. Gilman, who gave substantially the same testimony as did Mr. Cole as to how the accident happened, rate of speed and no slacking of speed before the collision.

Robert E. Harris, the plaintiff, then being duly sworn on his own behalf, gave evidence tending to show that he was a passenger on the train going from Idaho Springs to Denver, and was in the end of the observation car, the last car of the train, and on the side toward the mountain, and next the side track; that the car overturned by a collision, and he was thrown out into the river, and struck his back on something; somebody took him out, but he did not know who it was, and that he lost consciousness, and did not remember when he got home or anything until the next morning at 9 o'clock; that Dr. Hughes attended him; that he was bruised and had a pain in his left side, and that he has ever since and now suffers such pain and that the Dr. told him he was giving him morphine to ease his pain; that he was in bed off and on for three months, and in bed all the time for 20 days, and that Dr. Hughes attended him for three months until the Dr. told him he could do him no good, and advised him to go to Dr. Eskridge, and he did so. That the effect of the injuries he received was to wreck his nervous system entirely so that he could not write a letter nor attend to business or scarcely work; that both legs gave out; has to sit down and stop and rest,—his nervous system all torn to pieces, and has been since that day—has pain in both arms, shoulders, back and legs, and has had paralysis and shaking ever since occasioned by crushing of my back; that he shakes in his sleep ever since the accident; had never had paralysis before, and had never had shaking, but had had rheumatism occasionally in his shoulder; that he was getting $125.00 per month at the time of the accident. Dr. Hughes attended him for three months, and then told him he could do him no good, and advised him to go to Dr. Eskridge, and he did so. He has been doctoring me ever since. Have been growing worse.

On cross-examination, witness gave evidence tending to show that they gave him whiskey after the wreck in the car; he had traveled for a distillery 23 years, four years in Colorado; that he had drank nothing that day, but that he was in the habit of drinking two, three or four times a day with his customer-, and has done this for twenty-three years, more or less; that he drinks when he feels like

it, but never to excess; that the rheumatism he spoke of affected
only his left shoulder and right knee,—had had it for four or five
years, but got better in Colorado; that he got around the house the
month following the accident, but in pain all the time; that
16 he had a rope stretched across the bed to ease his arms and
keep from shaking so badly, and that this was put up Sunday or Monday,—the accident happened Saturday; that he did not lose consciousness after he woke up at home, but was taking morphine for two or three weeks,—thinks he was conscious all the time; was rational, except when the pains came on, and they would give him morphine and he would go to sleep; he has heard there were other doctors there, but don't remember who they were; that he thinks that Dr. Hughes told him that Dr. Lyman was there the night he was hurt, that is the railroad physician; his nurse was with him all the time, Mr. Sherwood stayed with him about a week, and then Mrs. Sherwood for about four weeks; thinks Mr. Hussey came there the next day after he was hurt, the next morning, but thinks he did not see him then,—saw him Monday morning, August 1st; that he does not know J. R. Wood; that the shaking of *a* arms commenced directly after the accident, the next morning.

Doctor HUGHES, a witness called and sworn for the plaintiff, gave evidence tending to show that he was a physician and surgeon, and attended the plaintiff on the evening of July 30th, 1892, and found him suffering pain, but could get nothing intelligent from him; that he found a slight abrasion on the right-hand side above the hip, and the next day it turned black, and so continued for ten days,—was about the size of witness' hand; that he gave a hypodermic injection of morphine, one quarter of a grain, and that he afterwards continued the morphine; that he afterwards gave another form of it, called "Tully's powder," morphine and camphor; that he took that whenever the pain was serious,—a capsule of that at frequent intervals; that he gave morphine and other remedies; the treatment of giving morphine continued four or five days; that he treated him continuously from July 30th visiting him once or twice a day to the last of October, and at the office for two or three weeks longer. The next morning after the accident there was a slight trembling; that he attributed it to the shock and immersion in the water; the shock proper may have lasted four or five days; that the shaking has increased very much since then; that he advised him to go to Dr. Eskridge.

Cross-examination:

Witness gave evidence tending to show that he had never seen the plaintiff before, but was attending plaintiff's wife; that he knew nothing of plaintiff's general health or habits; that he and Dr. Lyman examined the plaintiff together about 9 o'clock in the evening, and that he asked Dr. Lyman what he thought about the duration of the case, how long the man would be in bed and he said he

could not tell. Dr. Lyman asked: "What do you think?"
17 and to which witness answered about two weeks but that he
couldn't tell, but that time he had not apprehended any serious consequences from the injury; that he couldn't tell, but that his judgment was that he would recover in two or three weeks; that he gave a quarter of a grain of morphine that night, and probably a quarter of a grain three or four times after that, and an eighth of a grain six or seven times; morphine was the only opiate given—it would render him drowsy, but not unconscious; that the effect of an eighth of a grain would be very light, might produce nervousness & general disquiet, small dose sometimes does that and that he did not give more than one-quarter of a grain a day; that he also gave bromide of soda gave him as high as a dram, rather large dose; a grain would only produce drowsiness; that he also gave nux (vomica) as a tonic; also iodide of potass-um; during all of the time, he complained of his back, and complained that there was something broken in there; I examined him innumera-l- times, he suffered great deal of pain; that the patient did not improve for two or three weeks and that there was nothing in the appearance of the wound as he saw it from which he would have expected any serious consequences, or that he would expect to be accompanied with partial paralysis or anything of that sort.

On redirect examination witness gave evidence tending to show that such an injury might be an effective cause of paralysis agitans; that injuries of that sort may produce it. It was not possible at the time to determine the full extent of his injuries or how long it would last. I think his present condition is the result of that injury.

The plaintiff also introduced as a witness Doctor ESKRIDGE, who, being first duly sworn, gave evidence tending to show that he was an expert specialist physician and surgeon, and that he had treated and examined the plaintiff many times; that he was then suffering from paralysis agitans, and that it is frequently caused by injuries of the kind of plaintiff's and that he attributed his condition to the injuries he received at the time of the accident, and that it was not probable that he would ever be any better, and that it would probably increase until he became helpless, and that he is now unable to work, and there is no cure for it.

Plaintiff also introduced as a witness, Doctor HOWELL PERSHING, and Doctor KIMBALL, who gave evidence tending to show substantially the same as Dr. Eskridge. That he examined plaintiff
18 first about the middle of August. He appeared to me like a
man who had not fully recovered from his shock at that time. His mind was not just ready; not quick in his responses. He did not seem quite clear. Examined him several times two weeks after, his mind was clearer.

Plaintiff also introduced CHARLES HUMBURG, as a witness, who gave evidence tending to show that he had known plaintiff in Sedalia, Mo., for 20 years; met him twice or three times a week; that he never saw any shaking or trembling, and he seemed a well man.

On cross-examination, witness said he had lived in Colorado 12 years; in the saloon business; that he had been back to Sedalia once, about four years ago; that he first saw the plaintiff here about two or three years ago; that plaintiff gets his meals at witness' saloon.

The plaintiff also introduced as a witness, Major Bock, who gave evidence tending to show that he was in the real-estate business in Denver, and has known plaintiff four years, and that when plaintiff was in town, that he generally saw him every day, sometimes twice, and that he was not affected with shaking of limbs.

On cross-examination witness said that he never had business with the plaintiff, and never talked with him about his health.

Plaintiff rests.

The defendant, to sustain the issues on its part, called as a witness, W. C. Hussey, who gave evidence tending to show, that he was claim-adjuster for the Union Pacific system, and was such in August, 1892; that he knows the plaintiff, and first saw him August 2, 1892, upstairs at his house; that he visited him for the purpose of making a settlement with the company; that it was the custom of the company to settle claims arising out of injuries received regardless of whether the company was responsible for the accident or not, and that the company settles many claims that it does not think it liable for; that he went on to settle the claim with plaintiff, and saw plaintiff.

"Q. You may state what conversation you had with him in respect to the settlement of this claim?

A. I told him that the company was willing to settle with him for the injuries that he had received. I asked him if he had thought of the matter, and if so what he thought the company ought to allow him. He said he had not thought of it a great deal, and
19 that he would like to see his doctor and have a talk with him
about the matter before he set any price. I stayed with him a little while and talking on other matters, and finally told him that I would be up the next day to see him, and in the meantime he could see his doctor, Dr. Hughes, I believe it was, and have a talk with him, and I would be up the next day to see him; I went off and left him.

Q. Did you go the next day?

A. I did.

Q. What conversation if any did you have with him at that time?

A. I asked him if he had talked with his doctor about the matter; he said he talked with him a little; and I asked him what conclusion he came to; he told me he would rather I would go down and see Dr. Hughes, and whatever Dr. Hughes said would be all right."

I asked him if he had spoken to Dr. Hughes, given him any authority to settle the case for him, and he said he had. I told him that we had not injured Dr. Hughes, and it was not our custom to go and see anybody but the parties that we had injured, but as long as he requested it I would do so. I went down and saw Dr. Hughes, he said that Mr. Harris had given him no authority to settle the case for him, and he did not care to put any price or name any amount at which settlement could be made. I then told the doctor that I guessed I would go back and see Mr. Harris if that was the case. He says, "You better not go; he may think you are getting anxious about it;" but I went over, got on the car again, went out and saw him and talked with him; asked him what his expenses had been; how long he thought he would be laid off. He said he did not know. I told him that in my talk with Dr. Lyman that he had given me his opinion, that he probably would be able to be up and around in a couple of weeks; and we went on talking awhile and I finally told him that we had no authority to make any allowances greater than the sum of $250 without first referring the matter to Omaha to get the authority of the general manager. He said he thought he ought to have 300 dollars. I told him it was impossible for me to allow more than $250 to settle the case; but that I would do this—I would allow him, would give him a voucher, a draft for $250; and he spoke about having to go down into New Mexico to Santa Fé, or somewhere; I told him when he got around so he could come down if he would come around to the office we would try to arrange for transportation down as far as Trinidad, as far as our line went, and back again, which would make up very near the amount of $300; but he must understand that the $250 cash was the amount of the settlement.

20 We talked the matter over a little further, and he finally agreed to settle, take the $250, and I went off and left him. I never have seen him from that day until today.

Q. Did you inform the office of this negotiation?

A. I did.

Q. Who is the claim agent here?

A. Mr. G. N. Manchester.

Q. You informed him of the settlement that you had made?

Objected to because incompetent and immaterial.

The COURT: I think that is material.

—. Yes.

Q. Do you know of the fact of papers being arranged immediately after your going down to the office for the purpose of settling it?

A. Yes, sir, I know they were.

Q. You know they were drawn up in the office while you were there?

A. Yes.

Q. Take these papers, see whether those are the ones that were drawn up in the office immediately after you went down there?

A. Yes, sir, I believe they are; this is Mr. Manchester's signature; I think I can swear that those are the papers.

Cross-examination of W. C. Hussey.

By Mr. Felker:

Q. How long have you been engaged as a claim agent for this defendant company or an adjuster?

A. A little over two years and a half.

Q. What was your business prior to that?

A. I have been railroading for the past twelve years, a little over five years I was in the superintendent's office; three years I was in the bridge-building department, six months tie-inspector, one year time-keeper in Denver yard.

Q. What did you know of the policy of this defendant company in regard to settlement of claims before you went to settle any claims?

A. (O) knew nothing.

Q. What do you know about the policy of this company in settling claims outside of the claims you have settled yourself?

A. I know of claims that they have settled by Mr. Manchester the claim agent, in the same manner that I have settled them.

Q. What claims do you know of Mr. Manchester settling?

The Court: That will do, you need not follow that subject.

Q. How soon after an accident have you known of Mr. Manchester settling claims?

Witness: The same day.

The Court: You need not ask that, sir.

21 Q. Did you go to the house of this plaintiff on Monday after the accident?

A. No, sir, I went on Tuesday the second.

Q. Didn't you go there on Monday at all?

A. No, sir, I did not.

Q. Wasn't there at all Monday?

A. No, sir, I was not.

Q. You are sure it was Tuesday?

(Witness refers to memorandum and says) "Yes, sir, it was Tuesday."

Q. Do you know outside of a memorandum you have got, what day it was?

A. No, sir, it is my diary that I kept every day, the record of work I do, what I do.

Q. Outside of that written memorandum, your diary, you don't know whether it was Monday or Tuesday?

A. I will swear it was Tuesday.

Q. Outside of the diary?

A. Well, I would have to refresh my memory with the diary. I know it was the second of August; that was Tuesday.

Q. How do you know it was the second of August?

A. From a diary.

Q. Only from your diary.

A. That is all.

Q. What time of day did you go there?

A. In the morning, nine or ten o'clock.

Q. How long did you stay there?

A. Stayed there,—I suppose I stayed there an hour and a half.

Q. Is that as long as you stayed?

A. Well, I might have stayed a few minutes more, might have been a few less.

Q. Didn't you stay as much as two hours and over?

A. I don't think I stayed two hours.

Q. Who let you in at the door?

A. A lady.

Q. Who was she?

A. I don't know, never saw her before, have never seen her since.

Q. Was she American or Swe*ed?*

A. I think she was American, she talked pretty good English.

Q. Who was in the room when you first went there?

A. There was a gentleman nurse.

Q. What did he say to you about talking to Mr. Harris?

A. He said nothing; he talked with me as well as Mr. Harris.

Q. Didn't he tell you at that time that Mr. Harris was not in a condition to be talked with?

A. No, sir, he did not; he did not.

22 Q. Didn't he tell you that Dr. Hughes had left word that nobody must disturb Mr. Harris in his condition?

A. No, sir, he did not, he did not.

Q. What was the first thing you said to Mr. Harris when you went in there?

A. Well, I could not say the first words I inquired after his health I am pretty sure.

Q. Of whom?

A. Of Mr. Harris himself.

Q. Did you make any inquiries of the nurse with regards to his health?

A. No, sir I don't think I did; most of my conversation was with Mr. Harris himself.

Q. You started right in conversing with him?

A. Yes, sir.

Q. How long did you talk with him about his health?

A. I don't know that I could say the exact time.

Q. About how long?

A. It might have been five, ten or fifteen minutes.

Q. Then what did you commence talking about?

A. I can't remember the exact order of the conversation; we talked on a great many different subjects; I mentioned the fact of his having been in an accident; that the company was willing to settle with him. I think I talked with him on how the accident occurred.

Q. Now, after you had finished talking with him about his general health, you immediately commenced talking with him about the accident did you?

A. Well, that would be the natural drift of the conversation, I should think; I presume that was the order of it.

Q. Commenced immediately to talk to him about settling?

A. I don't know that I began to talk immediately about settling.

Q. How long had you been there before you commenced talking about settling this thing?

A. I could not say.

Q. Was it ten minutes?

A. I don't think it was.

Q. After you commenced talking with him about settling you continued talking on that subject until you left, did you?

A. No, sir.

Q. What other subject did you talk about?

A. After I had talked about the matter of settling awhile, and he said he wanted to see Dr. Hughes before he made any proposition, then we began talking about various other subjects.

Q. How long then did you continue such talk on various other subjects?

A. Till I left there.

Q. Didn't refer again to the settlement?

23 A. No, sir, after he said he wanted me to see (Dr. Hughes).

Q. How long was you talking about settling?

A. I don't know as I could say how many minutes it was.

Q. Now, in your first talk with him in regard to his health, what did you gather as to what was the matter with him?

Objected to because immaterial. Objection overruled.

A. Why, I thought the man had been shaken up pretty well.

Q. You thought he had?

A. Yes, sir.

Q. In what position was he lying in the bed?

A. On his back.

Q. Any support from any direction?

A. I think he had pillows under his head. And he had a string or something down I don't know whether from the chandelier or roof with his arm kind of strung up in it.

Q. Did he have hold with both of his arms by this support above his bed?

A. No, he had one arm lying in it, his right hand if I remember right.

Q. Did you see him shaking at that time?

A. Yes, sir, I noticed his right hand shaking; I did not notice his left hand.

Q. Which hand did he have up in this support?

A. The right hand.

Q. Is that the only one you noticed was shaking?

A. Yes, sir.

Q. Didn't notice his left hand shaking?

A. Did not.

Q. Did you see his left hand shaking at all?

A. I don't think it was.

Q. Sure of it?

A. I would not swear to it, I did not notice it shaking.

Q. This was about nine o'clock when you first went there?

A. I believe it was about that time.

Q. Did the nurse tell you anything about his injuries?

A. It was not necessary, she did not tell me anything.

Q. I don't care whether it was necessary or not, did he tell you anything about it?

A. No, sir.

Q. Do you know the name of the nurse that was there?

A. No, sir, I do not.

Q. What was the first thing that you said to Mr. Harris about his injuries?

A. I don't remember.

Q. What was the first thing you said to him about settling?

A. I think I asked him what he thought the company ought to do; that is the question I generally ask.

Q. That is the question you generally ask?

A. Yes, sir. What he thought the company ought to do to make the matter right with him.

24 Q. What was the question you asked him there at that time?

A. I don't know unless it was that.

Q. You have no distinct recollection of what it was?

A. No, sir.

Q. Did you not tell him there at that time that your company was not liable for any damages for his injuries in that collision, but that the Silver Age Mill Company was liable?

Objected to because immaterial and because calling for the mere expression of an opinion. But the court overruled said objection; to which ruling of the court in overruling said objection, defendant by counsel then and there excepted.

A. I don't remember exactly; I know we talked over about how the accident occurred.

Q. Answer yes or no, whether you did or did not?

A. I don't remember.

Q. Had you at that time seen Dr. Hughes?

A. No, sir.

Q. Had you at that time seen the doctor the surgeon of your company, Dr. Lyman?

A. No, sir, I believe it was the next day I saw him.

Q. Then you hadn't seen any physician who knew of his condition prior to the time when you first went there?

A. No, sir, I believe not.

Q. He did the most of the talking, did he, in this conversation?

A. I don't think he did any more than I.

Q. Did he do as much as you did?

A. I could not say about that; he would talk and then I would talk, asking questions and answer- them.

Q. Did you in that first conversation tell him that Dr. Hughes had told you that he would be up and well and around in a couple of weeks?

A. No, sir, I did not: I had not seen Dr. Hughes then.

Q. What proposition did you make to him, what words did you use in your conversation in regard to settling with him?

A. I asked him what his expenses were or what he thought they would be how much.

Q. Did you figure up about what his expenses would be?

A. I believe we did.

Q. Did you figure up about what his doctor bill would be?

A. I think we did.

Q. Did you figure up about what his loss of time would be?

A. Yes, I think so.

Q. Did you figure up about what his expense for a nurse would be?

A. Yes, sir.

Q. You figured up, then, all of the expense of his sickness, did you?

A. Yes, sir.

Q. For how long a time?

25 A. I think we figured for about two weeks.

Q. For about two weeks?

A. Yes, sir.

Q. What did it all come to?

A. I don't remember now.

Q. Did it come to $250?

A. Yes, I think it came to a little more that that; he said he thought he ought to have $300.

Q. That would include his doctor's bill, his nurse's bill, and his loss of time as you figured it up there, to a little over $250?

A. Yes, sir.

Q. Did you say that he said he ought to have $300 for it?

A. He said he thought he ought to have $300 for it.

Q. That was upon the basis he was going to be up and around attending to his business on the expiration of the two weeks?

A. He was willing to settle for that amount.

Q. You only figured it up for that amount?

A. Yes, sir.

Q. Did you tell him the result of your figures that you had made in regard to his expenses?

A. I presume I did.

Q. You presume so? Did he exhibit any pain while you was there?

Objected to by defendant's counsel because defendant did not ask about his pain; objection sustained by the court.

Q. Was he under the influence of any opiates at that time?

A. I don't know, I don't know whether he had taken any or not.

Q. Didn't tell you.

A. Didn't act like a man that was under the influence of anything.

Q. Did he move around in his bed any while you were there?

Objected to for the reasons before given. But the court overruled said objection; to which ruling of the court in overruling said objection defendant by counsel then and there excepted.

A. Why, yes, he moved his arms around.

Q. Did the nurse move him while you were there in the room?

A. I believe the nurse did once; I don't remember whether it was the first or second time, I think the nurse took hold of him, moved him once; that is my recollection now.

Q. Well, after you had figured up the amount of the expense of his loss of time and his doctor's bill, and his nurse's bill did you then ask him about seeing his doctor?

A. No, after we figured all that up then I went away and left him, and I never have seen him since until today.

26 Q. You was there the second time, wasn't you?

A. Yes, I was there on Tuesday, and I was there on Wednesday, that is the second and the third.

Q. Have you given me the conversation you had at the first time or second time?

A. The conversation at the first time that part of it that relates to the figuring up was the conversation had the second time.

—. Well, now, I don't want to get those two times mixed, I want to get what the conversation was the first time?

A. Didn't have any conversation the first time in regard to any amounts after he said he wanted to see his doctor before settling. I didn't have anything more to say about settling.

Q. How long were you conversing with him about his injuries and about his seeing his doctor that first time?

A. I don't know. It could not have been a great while, ten or fifteen minutes perhaps.

Q. Now, that includes all, ten or fifteen minutes embraced all the conversation you had with him that first time, which you say was an hour and a half or upwards in regard to his injuries or settlements?

A. I talked longer than that in regard to his injuries, but not in regard to his settlements.

Q. How long were you talking about his injuries?

A. I don't remember.

Q. Did you try to find out from him the extent of his injuries?

A. Not particularly.

Q. Did he tell you the extent of his injuries in that first conversation?

A. I think he did.

Q. What did he tell you about them?

Objected to because not cross-examination; but the court overruled said objection; to which ruling of the court in overruling said objection defendant by counsel then and there excepted.

A. He told me about being—the way he was thrown out, shaken up, thrown out through the car window, I think he said onto the rocks; he was badly bruised; that is about all I remember now.

Q. Did he say where he was bruised?

A. I think he said he was bruised on the back.

Q. Did he say to what extent he was bruised?

A. Not that I can recall now.

Q. Did he say how much pain and suffering it had caused him?

A. I don't remember that.

Q. Didn't you go back there the same day that you were there in the morning the first time?

27 A. No, sir, I did not.

Q. Didn't you go back in the afternoon of the same day?

—. (No.)

Q. You are sure of that?

A. I am sure of it.

Q. When did you next go back?

A. The next morning.

Q. What time of day?

A. I think it was about this same time, nine or ten o'clock.

Q. Now, you are sure you did not go back to him in the afternoon of the same day, you went there first, and you are sure you did not stay with him in that room from three hours and upwards the same day in the afternoon, you went there the first time?

A. No, sir, I did not.

Q. You are sure of that?

A. Yes, sir.

Q. How long were you there the second time?

A. I went there about I suppose in the neighborhood of nine o'clock, talked with him awhile, then he wanted me to go down and see Dr. Hughes; I got on the car and went down there.

Q. How long did you stay with him before you left the house that second time?

A. I don't remember just how long it was.

Q. Did he say to you that he had seen Dr. Hughes himself?

A. I don't remember that.

Q. Did he say that he hadn't seen him?

A. I don't remember.

Q. When you were there in the first place you say you cut your conversation off short, because he said (*he said*) he wanted Dr. Hughes——

A. I said I didn't talk about settlement any more, because he wanted to see him.

Q. When you went back there did you inquire as to whether he had seen Dr. Hughes or not?

A. I don't remember that.

Q. Nor he didn't tell you whether he had or not?

A. I don't remember whether he did or not.

Q. How long did you stay before you left the house that time?

A. I don't remember just the exact time.

Q. About how long?

A. Oh, it might have been three-quarters of an hour, somewhere near that.

Q. What did you talk about?

A. Talked about settlement.

Q. What did you talk—give us the conversation?

A. I don't suppose I can repeat the exact words; figured up what his expenses had been, what they were liable to be, how long he thought he would be laid up.

Q. That was the second time, and before you went to see Dr. Hughes, you figured up the amount of his expenses?

28 A. Well, that was after I had been down to see Dr. Hughes, got back the second time.

Q. I am getting at what you said, what the talk was before you went to see Dr. Hughes, let us have all that first, what was said?

A. Why, I know I asked him about making the settlement, and he said that he would rather I would go down and see Dr. Hughes, and whatever he said was all right—something like that.

Q. You say you asked him about the settlement, what were the words you used to him?

A. I can't give you the exact words.

Q. Approximate it the best you know how, about what did you say to him, what was the substance?

A. The substance was, in ta-king with him all through to get him to say——

Q. What did you say to him?

A. I can't tell you the exact words I don't know.

Q. Tell me nearly as you can the words you used to him?

A. I tried to do that, and you stopped me.

Q. No, I didn't stop you doing that, you said you tried to settle with him, what were the words as nearly as you can recollect that you used?

A. Well, it was just a general conversation asking him what he thought that the company ought to do for him, to settle the case, and he referred me down to Dr. Hughes and in a general way told me that whatever Dr. Hughes said or whatever amount we could agree upon was all right; and I think I asked him if Dr. Hughes had any authority to name any amount, and he says "You go ahead; see Dr. Hughes, if you can agree on an amount it will be satisfactory to me," or something like that; I would not say that those were the exact words, because I don't know.

Q. Is that all the substance of what you can recollect was said there at that time, before you went to see Dr. Hughes?

A. Yes, sir, as nearly as I can recollect that is.

Q. And you were there about three-quarters of an hour?

A. Yes, sir, I presume I was.

Q. Anybody else in the room?

A. The nurse was there part of the time.

Q. Man or woman?

A. Man.

Q. How much of the time was the nurse there?

A. I could not say.

Q. During that conversation did he have his hands up, hold of this support that he had over his bed?

A. Sometimes he would have his hands up there, and sometimes they would not be.

29 Q. Did you notice any shaking of his hands during that conversation?

Objected to by defendant's counsel, for the reason—"That has been ruled out once."

The Court: My impression about it is he has asked all about it, it has been stated.

Mr. Teller: He cannot show his condition on this cross-examination; I only asked him as to the conversation as to settlement.

The Court: Oh, yes, sir, he can ask about his condition; the position of counsel is that the plaintiff was not in a condition of mind to make this settlement; of course he can ask about his condition; I really think he is asking for what has already been stated.

But the court overruled said objection; to which ruling of the court in overruling said objection, defendant by counsel then and there excepted.

A. Yes, sir. I thought his hands were shaking.

Q. Did you do the most of the talking in this conversation?

A. I don't think I did any more than he?

Q. Did about the same amount?

A. That is my impression.

Q. Did you tell him in that conversation that the company was not liable for his injuries, but this mill company up there, was.

A. Not that I remember of.

Q. Did you go and see Dr. Hughes?

A. I did.

Q. Have a talk with him about it?

A. Yes, sir.

—. Did you have a talk with Dr. Hughes or inquire of him as to his condition of his mind and nervousness?

A. No, sir, I went to him and told him that——

Q. I asked if you asked him about it?

A. No, sir.

Q. Did you ask Dr. Hughes about the extent of his injuries?

A. I don't think I did.

Q. And Mr. Hughes did not describe to you or tell you the extent of his injuries?

A. I don't think he did.

Q. Now what did you say to Mr. Hughes?

A. I told him I had been sent there by Mr. Harris, and Mr. Harris wanted the doctor to talk with me and arrive at some basis of settlement and that whatever amount he agreed to why Mr. Harris would be satisfied. He told me he didn't have any authority to make any settlement.

Q. Is that all you said to him?

A. No, I talked to him about other matters.

Q. Is that all you said to him about Mr. Harris' statement?

30 A. No, no, I told him I will go back out there again and see him if you haven't any authority to settle the matter, and he told me, I think he told me perhaps it would not be better for me to go right back out there, because he might think I was getting anxious or something.

Q. Didn't he tell you he was in no condition to settle?

A. No, sir.

Q. Did not?

A. No, sir.

Q. Didn't you ask Dr. Hughes whether he didn't think $500 was enough to pay him?

A. Never named any amount to him?

Q. Didn't you ask him, Dr. Hughes, if he didn't think $500 would be enough to pay him and didn't Dr. Hughes tell you that if you settled with him for that you were getting off very easy or almighty easy?

A. I don't remember any such conversation.

Q. Are you sure that you did not make that statement to Dr. Hughes?

A. I don't remember it; I don't believe I did.

Q. Didn't he tell you if you got off with $500 it would be very easy?

A. I don't remember any such conversation.

Q. Didn't he tell you the man was injured very severely?

A. He might have, I don't remember.

Q. How long was you talking with Dr. Hughes about Mr. Harris?

A. Oh, it could not have been more than ten or fifteen minutes; there were other parties waiting in his waiting-room to come in and see him; I didn't want to take up too much of his time so I didn't stay very long.

Q. He did tell you you hadn't better go up there again?

A. He told me perhaps if I went back Mr. Harris would think I was anxious about the matter, I think that is what he said.

Q. That is the only reason he assigned for not wanting you to go back, is it?

A. That is all I remember of his saying now.

Q. You went right back did you?

A. I did.

Q. How long were you away from the house on this trip to Dr. Hughes' office?

A. I went out, got on the street car, went right down to his office, stayed there ten or fifteen minutes walked over on Fifteenth street, took the Broadway car, went right back.

Q. About what time was it when you got back to the house, Mr. Harris'?

A. I don't remember.

Q. Was it eleven o'clock?

A. I should judge it would be about that time, a little before or a little after, I could not say just what.

31 Q. How long did you stay with him that time after you got back?

A. I think I stayed till nearly noon.

Q. Did you stay there two or three hours?

A. I don't think I did.

Q. Did you stay there two hours?

A. I don't think I stayed over an hour.

Q. Who was present during that conversation?

A. The nurse was in there part of the time, and he went off down to the drug store, if I recollect right, to get some medicine, or something, came back again.

Q. Mr. Harris was still laying on the bed?

A. Yes, sir.

Q. Supporting his hands upon this rest?

A. A part of the time I don't think they was all the time.

Q. What did you first say to him when you got back from Dr. Hughes?

A. I think I told him that Dr. Hughes did not want to set any amount, something like that; because that is what Dr. Hughes said.

Q. Didn't you tell him Dr. Hughes told you he thought $250 was enough?

A. No, sir, I did not; I had no right to make such a statement.

Q. Well, what did you say to him after you told him that Dr. Hughes would not name any sum?

A. Well, we started in to figure up what his expenses were, loss of time.

Q. What else was figured in?

A. There was the nurse.

Q. And his doctor bill?

A. Figured in the nurse for two weeks, doctor bill, medicines, loss of time.

Q. How much did you figure his loss of time at?

A. I don't remember the figures now.

Q. What did you figure his medicine at?

A. I don't remember the figures of any.

Q. What did you figure his doctor bill at?

A. I don't remember any figures.

Q. You don't recollect the figures you put on the nurse?

A. No, sir.

Q. But they all aggregated something over $250?

A. Yes, sir.

Q. After you got through figuring with him didn't you tell him $250 was all you would allow without sending the claim to Omaha, and that if you sent that claim to Omaha he would not get a cent?

A. No, sir, I did not.

Q. Didn't you tell him in that conversation that the company was not liable for any damage for his injuries at all, but that you were giving that to him as a gratuity?

32 A. I might have told him I didn't think the company was liable, and I don't.

Q. Didn't you tell him that if you sent that claim to Omaha he never would get anything?

A. I don't believe I ever told anybody such a thing.

Q. I am asking you what you told Mr. Harris?

A. No, sir, I swear I did not.

Q. When this conversation was going on about your sending this claim to Omaha, was there anybody in the room?

A. I don't remember whether the nurse was there, or not.

Q. What proportion of the time was the nurse there this last time?

A. I should judge it took him perhaps fifteen minutes to go down to the drug store, fifteen or twenty minutes, somewhere along there.

Q. All the balance of the time he was in the room?

A. I believe he was.

Q. You did again tell him on this third conversation, the company was not liable in your opinion?

A. I gave him that as my opinion.

Q. Did he appear to rely upon your statement there?

Objected to because a mere expression of opinion by the witness upon a legal question. But the court overruled said objection, to which ruling of the court in overruling said objection defendant by counsel then and there excepted.

A. Well, I don't know whether he did or not.

Q. You made these statements to him that you did not think the company was liable at these several times with a view of having him believe them, didn't you?

Objected to because immaterial and irrelevant; objection sustained.

Q. What else did you say to him there on that third conversation?

A. I told him that we had no authority to make any greater allowance than $250 without referring the papers to Omaha. They limit us to that amount; we cannot pay any greater amount than that unless the general manager gives us authority.

Q. Not what they can or cannot do, but I am asking you what you told him?

A. I told him that.

Q. What else did you tell him?

A. I told him that if it was agreeable to him that we would make the voucher for $250 and settle the case and that when he got ready to go down into New Mexico, if he would come down to the office
that we would give him transportation down to Trinidad and
33 back again, that that was as near as we could get him where
he wanted to go; that would nearly make up the three hundred dollars we thought he ought to have.

Q. He did not name any larger sum than $300 to you?

A. Not to my recollection.

Q. All he wanted was $300?

A. I think that was what he told me the sum of $300 was mentioned.

—. After you had figured up the amount of his expenses—sickness?

A. Just the amount we named.

Q. Can you tell the exact figures you figured up his expenses sickness and loss of time?

Mr. TELLER: He has told you two or three times. You have asked the question two or three times and got an answer; this is too hot weather——

Mr. FELKER: Are you hot?

Q. What did he say in that last conversation; what language did he use?

A. I can't tell you all the language. Perhaps he can tell you better than I.

Mr. TELLER: Tell us as nearly as you can what he said?

A. He said he agreed; I don't know the words he used, but he said "All right, make the papers out and send them up and he would sign them."

Q. That is all you can recollect he said in that third conversation?

A. I cannot recall anything else now. Of course we talked, while we were figuring up we talked over the different items of expense that went to make up the total, but I don't remember all that was said; there is too much of it.

Q. Who besides the nurse at that first time did anybody tell you there was nobody permitted to see him?

A. Never a person told me nobody was permitted to see him, nobody.

Defendant further to maintain the issues on its behalf called as a witness JAMES R. WOOD, who being first duly sworn testified as follows:

Direct examination.

By Mr. TELLER:

Q. Where were you in whose employ were you, August 4th, 1892?

A. In the employ of the Union Pacific claim department in Mr. Manchester's office.

34 Q. The same office that Mr. Hussey is in?

A. Yes, sir.

Q. Tell what you know about the preparation—look at this release, tell us what you know about the preparation of it, when it was prepared, and why it was prepared?

Objection incompetent as to why it was.

A. I wrote this on August 4th, 1892.

Q. How did you come to write it out?

A. Why, upon settlement made by Mr. Hussey or agreement made with Mr. Harris, the day before. He returned to the office that night, and we made the papers the next morning.

Q. You made it out then on the information you received from Mr. Hussey did you ?

A. Yes, sir.

Q. You made it out the morning of August 4th, what did you do with it after you made it out ?

A. That same morning I went out to Mr. Harris' residence. I was admitted I think by the nurse, a gentleman, seated in the front parlor kept waiting I guess for a half or three-quarters of an hour; finally after waiting all that time I was admitted to Mr. Harris's bed-room upstairs, where I stayed about half an hour longer. I handed Mr. Harris the voucher; he took it, read it over, asked questions in regard to it. He turned it over. Our distribution figures were on the back. He asked me in regard to that. I told him what they were for. Finally he called for pen and ink ; a lady came in with them. He signed the voucher in my presence ; I signed as a witness.

Q. Did you give him—was it accompanied with that draft that is there ?

A. Yes, sir, I left the draft with him after he had signed the voucher.

Q. You left the draft with him after he had signed the release ; you signed the release as a witness ?

A. Yes, sir.

Q. What did you say to him when you went in the first thing you said to him before presenting this ?

A. I told him I was from the Union Pacific claim department, came up there to pay him the $250 Mr. Hussey and he agreed upon the day before.

Q. What did he say to that ?

A. At first he would have preferred to have seen Mr. Hussey he said, but I told him that Mr. Hussey was out of town ; it made no difference: that is about all he said excepting asking questions, in regard to the release.

Q. He asked questions in regard to this matter ?

A. He asked questions when he was reading it over.

Q. How long did you stay there ?

A. I was in his bed-room about half an hour.

35 Q. Did you see him read it over ?

A. I did, yes, sir ; heard him ask questions about this distribution on the back ; he asked questions about the figures on the back.

Mr. TELLER: We will introduce the papers.

Cross-examination of JAMES R. WOOD.

By Mr. FELKER:

Q. How long was the plaintiff reading this—how long did it take him ?

A. While I was there, I was in his room about half an hour, and the talk was all in regard to the release ; he had it in his hand, I think, most of that time.

Q. Was he reading this at the same time he was talking with you about it?

A. He was reading it and asking questions in regard to it.

Q. What was the first question he asked you about it?

A. I could not recall; he asked several questions in regard to different points about it; I can't recall what they were now.

Q. You can't recall what they were?

A. No, sir, some little points that came up, he did not thoroughly understand I explained.

Q. You have no recollection of what questions he asked in regard to it?

A. I do have a very vivid recollection of a question he asked in regard to the fact; he turned it over after he had read the face of it, and asked what those figures indicated.

Q. Did he read all this fine print down here?

A. I suppose he did.

Q. Do you know whether he did?

A. Yes, I know he did. I know he read it because he asked questions.

Q. About the subject-matter contained in the fine print?

A. Yes, I think part.

Q. You don't recollect what the questions were?

A. No, I cannot recall.

Q. Did he ask you any questions about this typewritten portion of it here?

A. I think he did, though that is merely a description of the accident.

Q. He did not ask you much about that?

A. I could not say.

Q. You don't recollect whether he asked you anything about the subject-matter of this typewriting?

A. I could not say positively, I know he asked several questions.

36 Q. Was all of this filled out, the bottom of that all fil-ed out when it was presented to him for his signature?

A. This typewriting was all filled out, I filled this date, and the date here there in the room.

Q. Right in the room?

A. Yes, sir, I signed my name.

Q. Did he hold this with both hands, when he was reading it?

A. I could not say as to that; I think he did when he signed it. I know he signed with his right hand. There was a book held under the voucher.

Q. When he was reading this was he lying down in the bed?

A. Sort of half lying down.

Q. What do you mean by sort of half lying down?

Here court adjourned to 9.30 a. m. July 15th, 1893.

The Court: I feel under the necessity of hurrying along with this case.

Mr. **Felker**: I want to ask him one or two questions in regard to this release, this assignment.

The **Court**: You can ask one or two.

Q. Did he send out for some ink?

A. He called a lady and she came and brought a bottle of ink with a pen.

Q. How did he hold this paper when he read it?

A. I think he held it in his left hand; I could not say.

Q. Did he hold it in one hand or both hands?

A. I could not say, when I first went in he had his right arm in this arrangement from the ceiling.

Q. Did he send out for anything else when he sent out for the ink?

A. Nothing I remember.

Q. Did he commence reading it?

A. Yes sir, it was after he thoroughly examined it he sent for pen and ink.

Q. Did he read it with his naked eye?

A. I can't say whether he had glasses on or not.

Q. Wouldn't you have noticed him put on his glasses if he had put them on?

A. I think I would; I don't remember his——

Q. What is your best impression whether he had glasses?

A. He might or might not have; I don't know.

Defendant introduced as a witness on its behalf, **George Alt**, who being first duly sworn, gave evidence as to the condition of plaintiff on the train after the accident; that witness was express messenger in the car, and noticed plaintiff's hands shaking when he took the bottle to drink on the car. I administered whiskey to him out of a bottle four or five times.

37 The defendant then introduced as a witness, J. H. **Cooper**, who gave evidence tending to show that in July, 1892, he was running on freight train between Georgetown and Denver.

Q. Do you know this flat car, coal car that caused the accident in this case?

A. Yes sir, I saw it.

Q. State what you know about that and when it was set on the side track, siding.

A. Well it was set there some seven or eight days before the accident I believe, as near as I can recall.

Q. Who set it?

A. We did on the track.

Q. You set it?

A. We set it there, yes sir.

Q. Where did you run that car to?

A. Clear above the mill.

Q. How far above the mill?

A. Oh, about one car-length, I should judge.

Q. Then on this map A you say you ran it up here somewhere?

A. Yes, on above the mill.

Q. A side track extended beyond the mill?

A. Beyond the mill; it extends three or four car-lengths I should judge.

Q. Has it been changed since then?

A. No sir not as I know of.

Q. You have not observed that?

A. No sir.

—. What was the car; was the car loaded when you stopped there?

A. Yes sir.

Q. What was it loaded with?

A. Coal.

Q. For what company was it loaded, for what purpose was it put there?

A. For the Silver Age mill, that I remember—I know it was.

Q. When you left it there what did you do in respect to putting the brakes on?

Objected to as immaterial; it was afterwards run down. But the court overruled said objection, to which ruling of the court in overruling said objection, defendant by counsel then and there excepted.

A. I saw the brakeman set the brake, I don't know whether he put a block under it; I could not say.

Q. You saw the brakeman set the brake?

A. Yes.

Q. How often at that time did you run over that part of the road?

A. Every day except Sundays.

Q. Did you see that car after you set it in there?

A. Yes, sir, saw it every day.

Q. Where was it for some days after you put it there?

A. It stood up there a few days I could not say how many; then it was dropped down to the lower end of the mill to be unloaded.

38 Q. You could not say how many days it stood up there before it was (*was*) dropped down?

A. No, sir, I could not say positively how many days.

Q. Did you see it after it was dropped down?

A. Yes sir.

Q. And standing near the lower end of the mill?

A. Yes sir.

Q. Were there any coal chutes at the lower end of the mill?

A. Yes, there is — coal bin there where they unload their cars.

Q. Does that unload into the mill?

A. Those all joined onto the mill; it looks just all the mill—because the pillars and all connected; buildings are connected one with the other.

Q. What is meant by the coal chutes, is it all a part of the mill?

A. Yes, it is all joined.

Q. And at the lower end you say?

A. The lower end.

Q. But you saw nobody unloading the coal?

A. No, I did not.

Q. How long did the car stand there at the lower end of the mill?

A. It must have been there one, two or three days, I could not say positively how many, because I know it was unloaded.

Q. Were you running on the freight train the day this accident happened?

A. Yes, sir.

Q. In the capacity of engineer?

A. Yes, sir.

Q. Did you run down the road from Idaho that afternoon with the freight train?

A. Yes, sir.

Q. About what time would you leave Idaho?

A. Well, we were a little late that day; I could not say how much, but I think we were about forty-five minutes or an hour ahead of the passenger.

Q. How long ahead of the passenger train was your schedule time?

A. Let's see, about two hours.

Q. Do you remember what your schedule time was?

A. What, on that freight?

Q. On this freight train, yes, sir.

A. About seven or eight miles an hour.

Q. I mean the hour in which you start from Idaho?

A. We must have left there about 2.30 I think.

Q. And the passenger train left at what time?

A. 3.30.

Q. Now, in going down did you meet with any obstructions on the track at that place?

A. No, sir.

Q. Did you see the car standing on the track?

A. Yes, sir.

Q. And where and at what place did you see it standing?

A. At the lower end of the mill.

Q. Apparently in the same place it had been some days before?

A. Yes, sir.

Q. And you observed nothing unusual in the condition of the car at that time?

A. No, sir, nothing at all.

39 Cross-examination of J. H. Cooper.

By Mr. Felker:

Q. What called your particular attention to notice that car that day when you went down?

A. Why, the millmen generally come out and flag us, push it back again, I was looking out.

Q. Does that switch track remain today the same it was the day of the collision?

A. Yes, sir.

Q. Has not been changed or altered at all?

A. Not to my knowledge.

Q. Is that a safety switch?

A. No.

Q. Describe to the jury what a safety switch is.

The Court: We don't care anything about it.

Q. If a car became loose on that track it would run right down on the main track, would not it?

A. Yes, sir.

Defendant further to maintain the issues on its part called as a witness Charles Morse who being first duly sworn testified as follows:

Direct examination.

By Mr. Teller:

Q. What is your first name?

A. Charles.

Q. Where were you living in '92 in July?

A. I was living in Denver.

Q. What were you doing?

A. Or rather I was living in Highlands.

Q. What were you doing?

A. Freight conductor for the Union Pacific railway.

Q. Were you freight conductor on the train Mr. Cooper has spoken of?

A. Yes, sir.

Q. Do you remember the time this car was set out at the Silver Age mill?

A. I don't remember exactly the time.

Q. Do you remember the fact?

A. I remember the fact of its being taken there from Idaho Springs.

Q. Do you remember when it was placed on the siding?

A. Yes, sir, it was placed above that mill.

Q. How far above the mill?

A. I could not tell you. I know as far as the lower end of the car would be at the upper end of the mill.

Q. A car-length then. How long did it remain at that place?

A. Well, I could not tell you that, something like three or four days, in the neighborhood of that.

Q. Then what became of it?

40 A. Well, it was dropped down to the lower end of the mill so that they could unload their coal on the car.

Q. Who dropped it down?

A. I don't know that; I suppose the millmen.

Q. Was the car loaded when it was put in there?

A. Yes, sir, with coal.

Q. And for whom and to whom was the car consigned?

A. It was consigned I suppose—I don't know that because I didn't take the car to Idaho Springs; but I supposed it was consigned——

Objected that the question is immaterial.

Q. Well, what was it put in there for?

A. I put it in there under the orders of the agent at Idaho Springs.

Q. Loaded with coal?

A. Yes, sir.

Q. Did you see it after it had been dropped down?

A. Yes, sir.

Q. How far was it dropped down?

A. Well, it was dropped down to the door in the coal-house, so they could unload their coal out of it.

Q. What distance was that from the upper end of the mill?

A. Well, it would be about the length of the mill, very nearly.

Q. Dropped down then nearly to the lower end of the mill?

A. As nearly as I can remember the lower end of the car was about opposite the lower end of the mill.

Q. Now, how many days did you see it after it had been dropped down?

A. Well, I could not tell anything about that, a day or two.

Q. You saw it standing there a day or two?

A. Yes, sir.

Q. Was the car loaded or unloaded when it was put there?

A. It was loaded at first and then afterwards was standing there unloaded.

Q. Did you notice the car when you went down the day the accident happened?

A. Yes, sir.

Q. Where was it then?

A. Standing at the place where it had been unloaded.

Q. The same place where it had been standing for some days?

A. Yes, sir.

Q. How long before the freight train went down did your train pass that point?

A. I think about forty or forty-five minutes.

Q. Was you on your regular time that day?

A. No, sir, we were late.

60 Q. When you passed it where was the car standing? A. It was standing by the lower end of the mill—so that the lower end of the car would be about opposite the lower end of the mill.

Q. Just where it had been for some days? A. Yes, sir.

Charles Morse, Cross-Examination

By Mr. Felker:

Q. How long have you been railroading? A. Since '75.

Q. Is it not usual and customary on the side track of a two per cent grade to put, in addition to [settling] the brakes to hold a car, a loaded or empty car on the side track of a two per cent grade, in addition to setting brakes to block the wheels?

Objected to; objection sustained.

The Court. You can't ask that sir.

Defendant further to maintain the issues on its behalf called as a witness GEORGE B. TARR, who being first duly sworn testified as follows:

Direct Examination

By Mr. Teller:

Q. What was your business in '92, July?

A. Passenger conductor on the Union Pacific, Colorado Division.

Q. Were you the conductor on this passenger train to which the accident happened? A. Yes, sir.

Q. How long had you been running on that train before the accident happened? A. Three years.

61 Q. Do you know the place where the accident happened? A. Yes, sir.

Q. Did you see the car which caused the accident?

A. I had seen it on the side track a few days beforehand.

Q. How long had you seen it on the side track?

A. I think it had been there about a week.

Q. Where was it stationed when it was loaded with coal?

A. It was the upper end of the mill, that is the west end; when it was unloaded it was the east end of the mill.

Q. It had dropped down then had it? A. Yes sir.

Q. About how far?

Mr. Felker. It is not necessary to accumulate testimony on that point. We shall not dispute that fact.

Q. How long had it stood in that position before the accident?

A. I don't know exactly how many days. But two or three days.

The witness also gave evidence tending to show that he got a bottle of whiskey for plaintiff & he drank 2 or 3 times of it that the plaintiff was traveling on a mileage ticket, and that witness asked him to sign his name, and that plaintiff trembled so that it was a hard thing for him to sign; that witness did not request him to sign the day he got hurt, but on other occasions had seen him write his name, and that it seemed a very hard thing for him his hand trembled so, and that he trembled the most the time he went up before he got hurt, the week before, he signed it very poorly because his hand bothered
62 him so,—trembled.

Defendant also introduced as a witness, Albert Nelson, who, being first duly sworn, gave evidence tending to show that he was a locomotive engineer in defendant's employ, and was on the engine at the time the accident occurred running twelve miles an hour; that he could see the flat car before he struck it 300 or 400 feet, and that as he thought, the car would not strike the train, but it did; that the first he heard was a noise behind, and then he applied the brakes; that he had seen a car standing on the side track when he went up that day in far enough to clear everything; that the grade of the side track toward the main track was about the same as the main track.

The defendant also introduced as a witness, Frank Graham, who being first duly sworn, gave evidence tending to show that he was in the milling business at the Silver Age Mill; that he had seen the flat car an hour or an hour and a half before the accident happened; that it was then standing opposite the engine room of the mill, and that when standing there it would not collide with trains; that he had seen it standing there for about three days before the accident happened, and before that he had seen standing at the upper end of the mill; that the car was loaded when he first saw it with coal for
63 the Silver Age Co., and had been standing there for the
purpose of being unloaded, and stood about a carlength above the upper end of the mill;that the car stood loaded about a week; the train men put it there and left it, and after that it was moved down to the boiler or engine room by the Silver Age Co. by one of their men, and unloaded by one of the men in the employ of the Co., after it was unloaded [ed], it stood there that night until the next afternoon. The coal belonged to the Silver Age Co., and was unloaded by one of the Silver Age Co's men.

Defendant also introduced as a witness, Doctor Lyman, who, being first duly sworn, gave evidence tending to show that he was a physician and surgeon in the employ of defendant in July, 1892, and that he first saw the plaintiff July 30, 1892, on the train; plaintiff said he was injured across the back and legs; that he made no examination at that time first noticed he was under influence of liquor; that plaintiff understood what was said to him at that time; that he saw him again that night about ten o'clock; examined him and talked with him and found a bruise on the left side of the back where he was red about the size of witness' hand; that he could find no evidence of injury to the spine; that Dr. Hughes was there; saw him again Monday afternoon,—the accident happened Saturday; that he was lying in bed complaining of considerable pain in his back; plaintiff was conscious and able to converse with witness; Dr. Hughes told witness that he gave at first 64 quarter of a grain of morphine, and afterwards an eighth of a grain; under ordinary circumstances this dose would not interfere with a man's consciousness, and one-eighth of a grain still less likely to do so; thinks that almost any patient could stand a quarter of a grain of morphine in two hours without producing unconsciousness; that he saw nothing that day of his being under the influence of opiates so but what he would be perfectly aware of everything going on and capable of business; Dr. Hughes and witness conversed in his presence on the subject of how long he would be laid up; the nature of the conversation was that the injury was mainly to the muscles of the back, and as far as witness and Dr. Hughes could see, the man would likely be up and around in two or three weeks; that was the opinion, as witness remembers that they expressed at that time,—believes it was expressed in plaintiff's hearing; when he first saw the plaintiff he noticed the trembling; had never heard of a case of paralysis agitans that came on suddenly. On

Cross-Examination,

witness gave evidence tending to show that if the patient was not in the habit of taking morphine, a quarter of a grain by hypodermic injection might have produced partial unconsciousness for three or four hours, and then the mind would be perfectly clear; that it was before four and six o'clock in the afternoon of Monday that he saw plaintiff with Dr. Hughes; plaintiff was lying in bed propped up with pillows; 65 that he notied the trembling — the hands then,—had not increased that he could see since Saturday.

Defendant then introduced as a witness, Doctor L. E. Lemen, who, being first duly sworn, gave evidence tending to show that he was division surgeon of the defendant, in charge of its hospital; that paralysis agitans may come from sudden mental shock, fright, continuous, business worry, disappointment and cold, and as a rule, developes slowly, but knew of one case where it manifested itself within 24 hours after the supposed cause.

Defendant here offered in evidence the release and check for $250.00, and plaintiff admitted that the same was paid.

Said release and check were as follows:

66 (Copy.)

Department No. 25249. Local Treasurer's No. 2062.
Audit No. E-194461.

Denver, Colo., Aug. 4th, 1892.

THE UNION PACIFIC RAILWAY COMPANY
To ROBERT E. HARRIS (Pass'r), Dr.,
of 968 Broadway, Denver, Colo.

Registered in
July, 1892.

Sent to
Sep. 3, 1892.
Comptroller.

Auditors Office
Aug. 30, 1892.
U. P. R'y Co.

Pay same

Address.................

1892. Aug.	4	For amount agreed upon in full settlement of claim against the Union Pacific, Denver & Gulf R'y Company on account of injuries received and property destroyed on July 30th, 1892, train 1/382, engine 116, about two miles east of Idaho Springs, on C. C. N. G. District, Colorado, while riding as passenger in car 823, and in full of all claims and demands of whatsoever character.				
		Claim settled for			250	00

Union Pacific R'y Co.,
Local Treasurer,
Aug. 1892.
PAID.

Paid by Draft No. 2958.

Auditor of
DISBURSEMENTS,
Aug. 9, 1892,
U. P. R'y Co., Omaha.

[Caculations] Correct.
Baxter.

MARGIN FOR BINDING.

Crandill.

Distribution Correct.
Cook.

Union Pacific R'y
Received,
Aug. 6, 1892,
Gen'l Claim Agent's Office,
Omaha, Neb.

Approved:
JOHN R. MANCHESTER,
General Claim Agent.

I hereby certify that the above account is correct.
G. N. MANCHESTER,
Claim Agent.

Approved:
E. DICKINSON,
General Manager.

The above account has been examined, found correct, and is hereby approved payment.
R. ANDERSON,
Auditor of Disbursements.
WILSON.

66½ Received, August 4th, A. D. 1892, of the Union Pacific Railway Company, Two hundred and fifty 00.100 Dollars, in full payment of the above account.

In consideration of the payment of said sum of money, I Robert E. Harris of Denver in the County of Arapahoe and State of Colorado hereby remise, release and forever discharge the said company, its operated, leased, controlled and auxiliary lines and companies, as well, also, as all companies whose lines are operated or known as a part of the Union Pacific System, of and from all manner of actions, cause of actions, suits, debts and sums of money, dues, claims and demands whatsoever, in law or equity, which I ever had or now have against said company, by reason of any matter, cause or thing whatever, whether the same arose upon contract or upon tort from the beginning of the world to this day. In case the said sum of money is paid for or on account of any claim against any other company, or for or on account of any legal obligation or liability of any other company, or for or on account of sums of money, dues, claims and demands whatsoever in law or equity, which I ever had or [how] have against any such other company, I expressly admit and agree that the Union Pacific Railway Company is fully authorized to make such payment for and on behalf of such other company, and to adjust and settle my claim against it, and I hereby remise, release and forever discharge the company for and on behalf of which the said sum of money is paid from all claims and demands whatsoever as hereinbefore more fully set forth.

In Testimony Whereof, I have hereunto set my hand this Fourth day of August 1892.

ROBERT E. HARRIS.

Witness:

J. R. WOOD.

Note.—The Receipt of this Voucher must be dated and signed by the party in whose favor the Voucher is made and the signature witnessed. When signed by another party the authority for doing so must in all cases accompany it.

67 Indorsed. Copy of release. Harris to The U. P.

"$250.00 The Union Pacific Railway Company. No. 2958.

Denver, Colo., Aug. 4" 1892.

At sight pay to the order of Robert E. Harris Two Hundred and Fifty no-100 Dollars, and charge to the account of personal injury and L. and D. property.

To F. D. Brown,
Local Treasurer Union Pacific Railway Company,
Omaha, Neb.

G. N. MANCHESTER,
D. C. A."

Indorsed. “Robert E. Harris—G. N. Manchester—Pay First National Bank, Omaha, Neb. or order for account of Colorado Nat'l Bank, Denver, Colo. G. B. Berger, Cashier.”

Defendant rested.

The plaintiff was then recalled in rebuttal. Plaintiff's counsel then made the following offer:

“The plaintiff offers to prove by witnesses, Dr. Eskridge and Dr. Hughes, Dr. Kimball and Dr. Pershing that for the space of ten to fifteen days the plaintiff had not recovered from his injuries, and that his mind was weakened, and that he was unable from that source alone to do any business; that in connection with the shock, with the administration of opiates, insufficient amount to cause unconsciousness, that at the time when defendant claims this agreement was signed his mind was not in a condition to fully understand or compre-
68 hend the terms and conditions of the agreement that was presented to him, and that, had it been read to him, or he read it himself, he would not have been able to appreciate the force and effect of it.

Objected to; objection sustained by the Court, and Mr. Felker excepted.

Mr. Felker. I offer to prove by Dr. Kimball that two weeks after the injury he called upon the plaintiff to examine him in regard to the extent of his injuries for the United States Accident Insurance Company; that he examined at that time the plaintiff and found him to be in a mental condition unfit to do any business or to comprehend and appreciate the force and effect of any business transaction that he might enter into.

Mr. Teller. I want ot enter my objections, first on the ground that it would not be admissible anyhow under any circumstances, and

Second. It is specifically inadmissible on account of the state of the pleadings.

The Court. I will sustain it; I do not go upon that ground; I think these physicians have testified as fully as they can as to his condition. I do not care to hear anything more from them.”

69 The plaintiff gave evidence as follows:

Q. Mr. Harris, do you recollect of Mr. Hussey coming to your house after this injury? A. Yes sir.

Q. Do you know what day it was that he first came there?
A. I think it was Monday.

Q. What condition was you in at that time?

A. I was suffering intense pain I know, and I was lying on my back, my hands up on the rest my nurse fixed for me so the pain would not be so bad, take and rest them.

Q. What medicine had been given you?

—. I could not tell you, I don't know what I was taking.

Q. Had any hypodermic injections been given you?

A. I was told so.

Q. State to the jury what you recollect of Mr. Hussey's telling you there at that time, what he said?

A. Well, I think I was asleep when he came in the room. How he got in there I don't know; and I saw there was a stranger there, a man I had never seen before, and he said he was a railroad man, wanted to come up to settle my claim; asked me how I was, etc. I told him I was badly hurt. He said he came up to settle a claim, I asked him what claim and he told me. He says "Although we offer you so much money over a certain amount,$250,it would have to go to Omaha,and may be you
won't never get anything; you beter take what we offer
70 now. He offered $250. I refused to have anything to
do with him. I said "I wish you would go out of my
room; I am sick; I don't want to talk to you." He insisted, stayed there about two hours in the morning.

Q. What did he say about his company being liable?

A. Well, he says "As far as the injury is concerned our company is not responsible for it; he says "We have leased that track to the Silver Age people and they are responsible for this accident, and not us, not the railroad.

Q. Now, how long did he stay there the first time?

A. I think about two hours. I know he worried me to death before he left. I referred him to my physician, Dr. Hughes, to go and see Dr. Hughes. "Whatever he does I am satisfied with I want to be easy; I want to be relieved."

Q. When did he call on you again? A. That same day.

Q. What time? A. In the afternoon.

Q. How long did he stay at that time?

A. I think he stayed all the afternoon; I know the time he left.

Q. What did he say about his company being liable?

A. About the same, his company was not liable for the accident; it was the fault of the people of the Silver Age; probably some of the boys had been playing on that car, turned the brake off and let the car run down; they were not responsible for it at all.

71 Q. Now, what did he say about what they were willing to pay for?

A. He said this would pay your doctor bill, he took a pencil when he came back in the afternoon, figured the cost my doctor bills would be and nurse, some other expenses, whatever my expenses would be, he said they were going to give me this to get me on my feet.

Q. Anything said about the loss of time?

A. Yes, I think he figured it up for two weeks.

He told me that Dr. Lyman had told him, also that Dr. Hughes had told him I would be out of my bed about my business in two weeks, two hundred and fifty dollars would pay me all expenses and time, and have money left.

Q. Was there anything said between you and Mr. Hussey about settling up your injuries? A. No, sir.

Q. For the damages for your injuries?

A. He said for your damages you will have to look to the Silver Age Mill people; because we are not responsible for it.

Q. Now, did he come there again?

A. Somebody came back and I thought it was him; because I was taking medicine all the time. Sometimes I was asleep, sometimes I was awake; my pain was so great the Dr. was giving me morphine, I demanded it, told him I must have it, I had never taken morphine before in my life; I was in such pain for ten, twelve or fifteen days I had to have some relief. I could not sleep nights, could not sleep any time.

72 Q. How would this morphine affect you after it was given?

A. It would put me asleep; it would ease my arms and back.

Q. How did it affect your mind?

A. I didn't have any sense at all, I reckon; I don't suppose a man has any sense at all takes morphine, I don't think he has. It was for pain I took it.

Q. Now, what do you recollect that transpired when this paper was brought there?

A. Well, sir, I thought it was the same man, but he had on specks the next morning. The man Hussey is a young looking man, he was on the stand here.

Q. Did you see this man Mr. Wood on the stand?

A. Yes, I saw him yesterday.

Q. Do you recollect whether it was him or the other man, which one of them it was?

A. I don't remember that man's face at all; he came in the morning I think, about nine o'clock, but I thought it was the same man.

He had on specks the second time he came back.

Q. Now, what did he do with this paper?

A. Well, he says, "Here is this agreement," and he gave it to me I think.

Q. Did you take this in your hands?

A. I looked at it, took it in my hand, looked at it; I could not read it, my hands was shaking so that I can't even read it now. I was worse then than I am now.

Q. Now, did you have your spectacles there?

A. No, sir, I did not.

Q. How long have you worn spectacles to read with?

73 A. Since sometime in the seventies. My best recollection is it was in '72 I bought the first pair.

Q. Now, can you read any portion of that at the present time without spectacles (handing release to witness)?

A. Without specks?

Objected to by the defendant because incompetent; but the Court overruled said objection, to which ruling of the Court in overruling said objection defendant by counsel then and there excepted.

A. No, sir, there is not a word on there that I can read.

Q. Not even the large print?

A. I can read right here this type, that is all I can read.

Q. Is that all you can read on that?

A. I can not read anything of this black at all. The letters I can see, I can't tell what it is.

Q. Put your spectacles on and see what you can do with it.

(Witness does so.)

Q. Can you see this large print? A. Yes.

Q. Go down to this fine print, can you read that?

Objection to this kind of examination because incompetent, but the Court overruled said objection; to which ruling of the Court in overruling said objection defendant by counsel [than] and there excepted.

A. No, sir.

Q. Can you read any portion of that fine print now?

74 A. No, sir, not a word of it.

Q. Is your eye sight as good now as it was when that paper was presented to you

Objected to because immaterial, incompetent and irrelevant, but the Court overruled said objection, to which ruling of the Court in overruling said objection defendant by counsel then and there excepted.

A. No, sir, I don't think it is. I think it has failed, I think a man fails all the time some.

Q. Well, could you at the time that paper was presented to you have read any portion of that paper without your glasses?

Objected to because incompetent, immaterial and irrelevant. But the Court overruled said objection, to which ruling of the Court in overruling said objection defendant by counsel then and there excepted.

A. Oh, no, sir, I could not; not a word on it.

Q. Were you at the time of signing that conscious that you were signing any agreement other than for your expenses of sickness and loss of time for two weeks?

Objected to by defendant because incompetent, and for the reasons before given. But the Court overruled said objection, to which ruling of the Court in overruling said objection defendant by counsel then and there excepted.

75 A. That is what he told me; that is just what he told me.

Q. Was that instrument read to you by the person who brought it to you? A. No, sir, it was not.

Q. Did he explain to you that that instrument was a receipt in full for all your injuries, for damages for your injuries?

A. No, sir; because he told me to look to the Silver Age for my damages; that this would put me on my feet, pay my expenses, doctor bill while I was in bed there, sick, that the two physicians told him I would be out in two weeks, Dr. Hughes and Dr. Lyman.

He says for damages, look to the Silver Age people; they are the cause of it.

Cross-Examination of Mr. Harris

By Mr. Teller:

Q. Do you know what time in the morning it was when he came there?

A. I think it was after breakfast, probably half-past eight or nine 'oclock.

Q. Do you know what day in the week it was?

A. I think it was Monday.

Q. What makes you think it was Monday?

A. I was hurt Saturday night; Sunday my friends were trying to get to see me and could not; the doctor was with me three or four times that day; it was necessary for him to give me opiates to keep me quiet; there was nobody in the room; I know there was two or three of my friends tried to get in. The doctor gave orders—

76 Q. You said yesterday you were conscious?

A. A portion of the time I was conscious except if I didn't take morphine I wasn't conscious.

Q. When did you take morphine first?

A. I don't remember, I think I got some that night.

Q. When did you get the second injection?

A. Was getting it every two or three hours in capsules.

Q. When did you commence to do that?

A. That was I think on Sunday; he might have given me another injection of morphine on Sunday morning, I am not certain as to that.

Q. Did you hear Dr. Hughes testify yesterday?

A. I think I did, yes, sir.

Q. You heard him testify he only gave you of morphine a hypodermic injection of one-quarter of a grain and later one-eighth? A. Yes, I believe that is what he said.

Q. Six or seven times in all? A. Yes.

Q. He gave you some bromide of soda?

A. I did not know what he was giving me.

Q. You heard him say that he gave you bromide of soda; do you know whether it was morphine that you had in those capsules or bromide of soda? A. I don't know, sir.

Q. Then you are just simply stating on a supposition?

A. I know when my pain would be so severe, that I would
call to my nurse for a capsule; they gave me, what it
77 was he gave me I don't know, but he said it was morphine.

Q. Do you remember whether you had taken any capsules, anything that morning or not, Monday morning?

A. Yes, sir, taken that night and morning too.

Q. How many had you taken?

A. I don't remember how many.

Q. Do you remember you had taken any that morning?

A. Yes, sir, I had to take my medicine every morning.

Q. Do you think you took it that morning?

A. I think so, I had my medicine given me by my nurse, I had to take it.

Q. You say you were asleep when he came?

A. I think I was, I think he got into my room without anybody knowing it.

Q. What was the first thing he said?

A. I think he introduced himself.

Q. Did he tell you his name? A. I think so.

Q. Did he tell you his business?

A. Before he got through he did.

Q. What was the first thing he said to you?

A. He asked me how I was; told me he had come to settle the claim; I told him I didn't know that I had one till he come to tell me.

Q. What else did he say?

A. Well, I told you; he said that he wanted to make up the account and pay me what was coming to me; he got a pencil and figured it up.

Q. What did he figure?

A. He figured $250 for two weeks.

78 Q. For two weeks' loss of time?

A. Loss of time and expenses, doctor bills and nurse bills.

Q. Did you make any claim of any kind then?

A. No, sir.

Q. Say anything about it?

A. I forget what, something said about more money than that if I had to settle; I forget what that was.

Q. But you do think there was something said about more money?

A. I am not certain, but I think so; I remember him saying that if he paid more than $250 the claim will have to go to Omaha, you may get something, and you may never get anything.

Q. Did he tell you why that was that had to go to Omaha?

A. I don't remember it. He says this: He says "I am not authorized to pay but $250;" but he says, "I can pay you that, and that will pay for your time, and pay your doctor bills, and pay your nurse, etc., and put you on your feet; and the two doctors say you will be up in two weeks;" "but," he says, "as for damages, you must go to the Silver Age people; because they are responsible for this wreck and not we."

Q. You are sure he said that?

A. Yes, sir, I know he said it.

Q. You said something about his having said they leased the track?

A. He told me they had leased the side track to the Silver Age people, the side track; they had nothing to do with that car, only had to deliver the coal, put off, something of that sort; but that the [the] company had leased the side track
79 to the Silver Age Mill.

Q. There was something said about more money, who said that?

A. I think it was him—if you claim more money than $250 I can not pay you.

Q. Were you claiming something more?

A. I tried to get him to get out of there.

Q. I asked you if you had said anything about more money?

A. I don't remember about that. I told him I didn't know I had a claim against the railroad; I hadn't thought about no claim; I was thinking about my back.

Q. Do you recollect of his saying to you, or your saying anything to him that you wanted to go down to New Mexico in the prosecution of your business?

A. I don't remember that; I heard him testify that on the stand yesterday, but I don't remember a word about going to New Mexico.

Q. Did you have business down there?

A. Occasionally, yes sir. From 1890 I went to New Mexico, and over the balance of Colorado.

Q. Do you swear you did not have such a conversation?

A. I don't remember that I didn't or did.

Q. He stayed there you think how long?

A. He stayed there I think two hours in the morning, and three in the afternoon; it looked to me like he was there all day.

Q. Were you awake at that time?

A. A portion of the time.

80 Q. Were you asleep any portion of the time when he was there?

A. I sent him to my physician, Dr. Hughes.

Q. I mean while he was there in the room you were awake and talking with him Mr. Harris, weren't you?

A. I think so.

Q. Well, now, you tell us what you said to him about going to your physician?

A. I told him to go and see Dr. Hughes, and whatever he did I would be satisfied with.

Q. You meant to have Dr. Hughes settle the claim then?

A. Just let him say what was right. I says I don't know how badly I am hurt. How long I am crippled, whether permanent or not I don't know; I know I am crippled, crippled badly. I want to see him, see what he says.

I want to see Dr. Lyman too. I want to see both of them.

Q. You recollect saying that to him?

A. I think I did, that is Monday afternoon, I think.

Q. Then did he go away?

A. It seems there was a second man on the program I didn't know.

Q. When was it you told him to see Dr. Hughes?

A. That was Monday morning, I think it was, and then he went away; went off, came back again and stayed the whole afternoon.

Q. What circumstance makes you remember that it was in the same afternoon?

A. Well, I don't know why I should think so.

81 Q. You heard Mr. Hussey say that his diary he kept daily, diary showed that it was not the same day. He went there first on Monday?

A. And he came back on Tuesday morning.

Q. And then came back the second time Tuesday afternoon, you heard him swear to that?

A. No, sir, I think he is mistaken.

Q. You heard him say he knew from his diary he kept of his business? A. Yes, that may be.

Q. Did you keep any diary at that time?

A. No, sir, I did not.

Q. You speak from your general recollection?

A. From my general remembrance that was the day he came there Monday morning, then he came back as I understood it Tuesday morning, I think it was the same man, but he had on spectacles.

Q. It turns out not to have been the same man?

A. About the same man, I think it was the same man.

Q. Well, speaking about the last time you saw Mr. Hussey before this paper was presented to you—the date of which when Mr. Hussey was there he went away, did he go to see Dr. Hughes?

A. He went in the morning to see Dr. Hughes and came back in the afternoon.

Q. Then it was you made this agreement and had this talk about the amount to be paid?

A. That is when this fellow figured up his costs.

Q. How did you figure it at $250?

A. That is what he figured; he done all the talking, I done as little talking as I could.

Q. You assented to that amount it should be paid
82 to you without leaving it to Omaha at all?

A. I must have done so.

Q. And the next morning, or some morning, if this was Monday that all this was done, then this latter paper was not presented to you until the second morning after that, until the fourth, this paper bears date on the 4th of August?

A. What day would that make it?

Q. Well, Saturday the 30th, Sunday the 31st, Monday the 1st of August, Tuesday the second, Wednesday the third, and Thursday would be the fourth.

A. Oh, no, it was not that late, no sir.

Q. It was not that late? A. No, sir.

Q. What reason have you for thinking it was not that late?

A. Well, I don't know why, but it seems to me it was on the second morning after Sunday, I think it was Tuesday morning was the wind-up of the thing; it was not as late as Thursday.

Q. Had you anything by which you can refresh your recollection as to the date of the transaction, either the signing of this instrument, of these interviews you had with Hussey?

A. I will tell you how I can arrive at that. I have got a nurse that was brought to my house Saturday night, he was employed, he has got a diary, record of every day, what de did, [what he did,] what he gave me. I can't remember, but I think

my best recollection this man came on Monday morning, went
to Dr. Hughes, came back on Monday afternoon, and back
again Tuesday morning, and that is when the final—that
thing was presented to me, it was Tuesday morning;
83 that is my best recollection; I think I am right, I might
be mistaken, but I don't think I am.

Q. At any rate, whether one time or another, the second time Hussey was there and figured up the amount, you agreed that that was the amount would be paid to you without leaving it to Omaha?

A. He says "I can't pay you more than $250; if it is more than that it will have to go to Omaha, maybe you will get something and maybe you won't, the chances are you won't get a cent."

Q. So you assented to taking this 250 without leaving it to Omaha? A. This for loss of time, etc.

Q. Now, what time in the morning was it this man came with the instrument, paper?

A. I think it was about nine o'clock, [half] half past eight or nine.

Q. What was the first thing now that he said to you?

A. I don't remember what he did say.

Q. You stated a little while ago that he said "here is this agreement"? A. I think that is about what he said.

Q. That is what he said—"Here is this agreement"?

A. Are you willing to—lets see, what was that he said; I believe he says "Are you willing yet to fix this expense account," something of that sort.

Q. You think that is what he said?

A. He said "I have got it all fixed up now, and here it is. He handed it to me. I could not see it, read it, could not hold
still, did not have specks. He did not read it.

84 Q. You could see very well it was a paper that had
printing on and writing on, could not you? A. Yes.

Q. What did you say to him when he said "Here is this agreement"? A. Well, I at first refused to sign it.

Q. On what grounds did you refuse to sign it?

A. I remember now, we had quite a talk about it.

Q. On what ground?

A. I say I remember we had quite a talk about it, and he was pretty smooth anyway, pretty smooth talker and he came over again this about this Silver Age Mill business, and says: "This now will get you up on your feet, out of bed, and pay your doctor's bills, your nurse, and your loss of time, and you will be all right.

Q. You say that this young man that presented this agreement for you to sign said anything about this Silver Age Mill?

A. I thought it was the same man.

Q. When he presented the paper to you was there any talk between you and the party presenting the paper about the Silver Age Mill? A. I think it was the same man.

Q. Did he say anything about it, any more than "Here is this agreement?"

A. My mind is not clear in regard to that; my mind is not clear.

Q. Your mind is clear that you took the paper is 'not it ?

A. Yes, I think he did, he left the paper with me.
85 Q. Did he leave it and go off?
A. One of them, I never know which one of them, but he left one paper with me, I think it was the check, he gave me one to sign; he left one with me, I think it was a check.

Q. The one he left with you was the check? A. I think so.

Q. The one he took away was the one you signed?

A. I think so.

Q. What did you use as a support in signing that?

A. I forget; I think it was a book was on the washstand that he gave me.

Q. That is your signature there, ain't it?

A. I am going to see; I have not noticed it before. (Witness looks and says) Yes, sir.

Q. [What] signature is fairly well written is not it?

A. Yes, sir.

Q. What did you have under your hand?

A. I think it was a book.

Q. Who got the book? A. I think he did.

Q. Where did you get the pen and ink?

A. I forgot about that, probably sitting in the parlor, I think maybe he went in the other room and got it.

Q. You say you asked the nurse or woman that was there to get the pen and ink?

A. I think he went for the pen and ink himself, may have spoke to them, but I don't remember.

Q. At any rate somebody got it? A. Somebody got it, yes.

Q. Now, look on the back of that check, Mr. Harris; that is your signature, isn't it?

A. Yes, sir, I think it is; it may differ some though.
86 Q. It differs some from the other?
A. Differs some apparently.

Q. At any rate, Mr. Harris, you got the money on that, didn't you? A. Oh, yes, that is all right.

Q. So that one is your signature anyway?

A. Oh, yes, sir, I got the 250 dollars.

Q. Do you know who drew that money?

A. I forget; I think I put it in the bank; I think it was deposited by my son.

Q. At the First National Bank?

A. No, not the First National, Colorado National Bank. Is that check drawn on the First National?

Q. It is drawn on the treasurer of the Union Pacific, goes through the Colorado National to the First National at Omaha; you put it in the Colorado National? A. Yes, sir.

Q. Do you remember when you put it in?

A. No, sir, I do not.

Q. How long did you keep that instrument in your hands after he handed it out to you and said "This is the agreement?"

A. How long did I keep it in my hands?

Q. Yes, sir.

A. I returned it to him instantly, told him I had no way to read it, could not read it.

Q. You told him you could not read it?

A. I considered it of insignificance anyway, a matter very—

87 Q. What did he say when you returned it to him and told him you could not read it?

A. Never said a word nor sound I seen.

Q. If you could not see to read this coarse print here, do you say you could not see to see this coarse print?

A. No, sir, I could not see a word; this I could not read if I was going to be hung.

Q. Will you tell the jury how you could see to write your name, if you could not see that coarse print?

A. I don't know, I wrote it.

Q. This print is much coarser than your writing?

A. I did not write that print.

Q. No, no, you wrote your name; that print is very much larger than the writing you make with a pen?

A. I don't think it is.

Q. Can you see that now?

A. No, sir, I read it with my specks.

Q. Put your specks on now. A. I can do it.

Q. Don't you think you could read this writing up here, this type-writing as easily as you could have written your name? A. If I had him to hold it for me.

Q. You had this laid on a book?

A. I think it is the way I wrote it on a book, one of these magazines.

Q. You wrote it on the check the same way the same day?

A. I don't know about that, whether the same day or not; I don't remember about the check part of it.

Q. Did you have your spectacles on when you wrote your name? A. I don't think I did.

Q. You could see to write your name then without your spectacles?

88 A. Well, I can do that any time in the night.

Q. Now, Mr. Wood said that you asked him several questions about this; is that true?

A. I don't remember Mr. Wood at all.

Q. Well, the gentleman who presented this note and paper for you to sign when you signed it, did he ask you any questions?

A. I forget, sir; I don't think there was but little talk because the [think] had all been fixed before.

Q. You remember a good deal of talk at each occasion; if you had been worried to death, like you say you were would you have remembered it; I ask you whether you remember several questions?

A. I don't remember very little of it.

Q. You also turned it over on the back of it here and spoke about the distribution of these accounts; do you remember that?

A. No, because that was never read to me; I did not read it myself. I had confidence in the man that came what he told me he was going to do. I handed it back, told him I could not read it, could not hold it still enough to read it if I was going to be hung.

Q. You signed it?

A. That is my signature, I don't deny it.

Q. You accepted this check and got the money on it?

A. I got the money on it, sir.

Q. Is your memory very clear upon this part of it?

A. Part of it and part of it is not. It was at the time I was taking morphine, could recollect some things, and some things I could not.

89 Q. I am asking about what occurred when Mr. Hussey was talking about the settlement, is your memory very clear upon what happened?

A. Tolerably clear, I think; this man Wood I don't remember him, some way or the other, he has slipped my mind some place, because I thought he was Mr. Hussey.

Q. The circumstances—

A. I see there you have got my signature; it is correct, I signed that.

Q. The circumstances of the conversation which occurred at these different times, you are clear about that portion?

A. I suppose under the condition I was in I could remember a great deal of it.

Q. Were you influenced in any way by the statement that Mr. Hussey or this other man made, that the Silver Age Company was the company that was liable to you?

A. Was I how?

Q. Influenced in any way, did you believe that they were liable to you for your damages?

A. [A.] A man come there about a claim and says "You get your damages from somebody else; yes, sir, I believed it implicitly:" he says "We are not responsible for this wreck at all; the Union Pacific Railroad is not responsible at all; you get your damages out of them."

Q. You believed him? A. Yes, I did.

Q. That is the reason why you entered into this agreement?

A. That is just exactly what caused me to sign that paper.

90 Redirect Examination of Mr. Harris

By Mr. Felker:

Q. You say you can write your name without your spectacles? A. I can write it in the night.

Q. You have no recollection of using any spectacles in writing at that time? A. No, sir, I did not.

The plaintiff, further to maintain the issues on his behalf, called as a witness in rebuttal MRS. LE ROY SHERWOOD who being first duly sworn testified as follows:

Direct Examination

By Mr. Felker:

Q. Mrs. Sherwood where do you reside? A. Denver.

Q. What is your profession? A. Nurse.

Q. Are you acquainted with Mr. Harris and Mrs. Harris?

A. Yes, sir.

Q. Where were you on the 30th of July 1892, and what were you doing at that time?

A. I was employed by Mr. Harris to attend his wife at—I can't remember the number, 968 Broadway, I think.

Q. Were you present when Mr. Harris was brought home that night? A. Yes, sir.

Q. Were you present when this man, Mr. Hussey first came there? A. Yes, sir.

Q. You may state what you heard Mr. Hussey say to Mr. Harris, and how you happened to hear it?

A. Why, Mrs. Harris was ill in one room and Mr. Harris in another, both opening out of the same hall.
91 When Mr. Hussey came to talk with Mr. Harris, Mrs. Harris said to me to step in the hall and see what that man said. I stepped into the hall and heard Mr. Hussey say "Well, our company is not responsible anyway; the car did not belong to us; if you want any damages you should get it from

the company that owns the car, which is the Mill Company I think; but as long as you were hurt on our road, we are willing to pay you 250, which will pay your expenses, but your damages our company is not [reliable] for, we don't own the car."

Q. What interview was that, the first or second time Mr. Hussey came there?

A. Well, I should say it was the second time, but I won't be certain.

Q. How many times did Mr. Hussey come there to your knowledge?

A. Well, to the best of my knowledge he came once in the morning, he came again in the afternoon, and went away for a short time, and came back again the same day as I remember.

Q. And this was the second time he was there you heard him?

A. I think it was the second time he was there, yes, sir.

Q. Now, were you there at the time when an agreement was signed a paper was signed by Mr. Harris? A. Yes, sir.

Q. Were you in the room during any portion of that time while the person was there?

A. Mr. Harris called me into the room to bring him pen and ink to sign the paper; I was in the room when he signed it.

Q. Did he have any spectacles on at that time?
A. No, sir.

92 Q. Did he read that paper while you were there?
A. No, sir.

Q. Was it read to him by anybody? A. No, sir.

Q. What time in the day was that?

A. Well, I should say it was somewhere in the vicinity of ten o'clock in the morning, but I won't say certain; I should say that vicinity.

Q. What, if anything, did you hear Mr. Hussey say in either of these communications about what Dr. Hughes had told him, in how long he was going to get up?

A. After he came back from going down to see Dr. Hughes, I think he came in the afternoon, and went away and saw Dr. Hughes, and came back in a short time. After he came back I heard Mr. Harris say "Well, what did Dr. Hughes say?" he said "Well it was not his business to set a price on what he should have, but he said he thought $250 would cover all expenses."

Q. This is what Mr. Hussey said Dr. Hughes had told him?

A. That Dr. Hughes said $250 would cover all expenses.

Q. Did you hear them talking about expense, and what it included, if so, please state.

A. I did not hear the whole conversation; I heard them talking about the nurse would be so much, and the doctor would be so much, but I did not hear the whole conversation; I was not in the room all the time.

Q. Did you hear them say for what length of time these expenses were figured up for?

A. I think they figured it for two weeks.

93 Q. The morning this paper was signed had you administered to Mr. Harris any opiates, if so, what?

A. No, sir, I had not myself.

Q. Had any person given him opiates that morning?

A. The nurse that was attending him came into Mrs. Harris' room and asked—

Q. Never mind—

A. I gave the nurse morphine to give to him; I did not give it to him.

Q. What time in the morning was that, how long before this man came with the paper?

A. Why, I should think it might be in the vicinity of an hour.

Cross-Examination of Mrs. Sherwood,

By Mr. Teller:

Q. How long did you stay in the hall listening to that conversation?

A. Only a short time. When I heard this that I have repeated I went in and told her as she had asked me to.

Q. You just waited long enough to hear that, did you?

A. I might have heard a few more words; I don't remember just how long I stayed, only a few moments though; I was called in to my other duties.

Q. What day of the week was it that Mr. Hussey came there first?

A. I can't say that positively; I think—it is my impression it was Monday; I can't say positive.

Q. It is your impression it was Monday? A. Yes, sir.

Q. Did he call again the next day?

A. I think he called in the morning; if it was Monday he called in the morning, again in the afternoon, then left a short time, went down I think to see Dr. Hughes, and came back the same day; that is my remembrance. 94

Q. Your recollection is he was there three times in one day? A. Yes, sir.

Q. You say that when he was there once he went away and came back, saying that he had seen Dr. Hughes, do you?

A. Yes, sir, he said he had seen Dr. Hughes.

Q. And you think that all the days of his visit he was there three times, it was all in one day and that day was Monday?

A. I should say that was it; I am not positive about the day, though, but I should say it was Monday; that is my recollection.

Q. Did you hear Mr. Hussey swear to this matter?

A. No, sir.

Q. Mr. Hussey says that he was there on two different days, but three times in all?

A. Well, I said I was not positive, that was my recollection, it was in the morning, then again in the afternoon, but I am not certain about that.

Q. When he came the second or third time in the afternoon, that was the time he said he had seen Dr. Hughes, was it?

A. I think it was, yes sir.

Q. You didn't stay to listen then to any more conversation, than just this you have related?

A. That is all I stayed for at that time; I was out and in Mr. Harris' room.

Q. Yes, but you didn't hear any of this conversation—have you related all the conversation you heard between Mr. Hussey and Mr. Harris?

95 A. I suppose I must have heard more, for I was out and in the room, as I told you; I don't recollect at this moment anything further.

Q. Now, was you there a day or so afterwards, was you there on the 4th of August?

A. Yes, sir, I was there until about the twelfth.

Q. Was you there when another young man came there to get this instrument signed?

A. Yes, sir, I told you I carried the pen and ink into the room.

Q. Did you see this young man that came with the paper?

A. Yes sir.

Q. Where did you first see him?

A. I think I first saw him coming up the stairs.

Q. How long did he stay with Mr. Harris?

A. Well, I should say in the neighborhood of two hours.

Q. Did you hear any conversation between this young man and Mr. Harris?

A. I heard them talking but I don't remember the conversation.

Q. You don't remember what was said; at whose request did you get the pen and ink?

A. Mr. Harris'.

Q. Mr. Harris' request, did he tell you what he wanted to do with it? A. No, sir.

Q. Did you look to see what he was doing with it?

A. I saw him sign the paper.

Q. You heard no conversation that you can recollect between those two at that time, at all?

A. I don't recollect now.

96 Q. Did you hear Mr. Harris asking this young man any questions about it?

A. No, sir; why, I don't remember of any questions that I heard him ask; the business was done before I was called into the room to sign the paper, to bring the pen and ink I would say.

Q. How long did he stay after the instrument was signed?

A. A very short time.

Q. Do you know how he came to be staying there two hours?

A. Well, he was talking with Mr. Harris is all I know about it.

Q. But you didn't hear what was said?

A. I didn't hear what was said, I knew he was talking with Mr. Harris.

Several times Mrs. Harris sent me into the room to tell Mr. Harris not to sign any papers.

Q. Mrs. Harris sent you in to tell him; did you tell him not to sign any papers?

A. I told him Mrs. Harris said he should not sign any papers.

Q. What reply did Mr. Harris make to that?

A. I don't remember; I don't think he made any reply.

Q. Did Mrs. Harris give any reasons why he should not sign the papers?

A. She said he was in no condition, because he was under the influence of opiates; I think that is the reason she gave.

Q. You said he took opiates that morning?

A. Yes, sir.

Q. Do you know what it was he took?

A. I don't know that he took any; I said that his nurse came into Mrs. Harris' room and asked for opiates for

97 him, and I gave them to him; that was morphine tablets.

Q. You don't know whether he took them or not?

A. I did not see him take them.

Q. You heard Mr. Hussey say when you came back that last time that Dr. Hughes said it was not his place to fix a price, did you? A. Yes, sir.

Q. To fix a price upon what?

A. I have not any idea.

Q. What it was?

A. For damages, I suppose. I don't think he said damages.

It was not his place to fix a price; words to that effect, it might have been not exactly those words.

Q. That is the substance?

A. That is the substance, yes, sir.

Q. What did Mr. Harris say when Mr. Hussey—

A. He knows better how much I am injured than than I do. I don't know how much I am injured; Dr. Hughes should know what my injury is.

Q. Was there anything more said in that connection about it? A. I don't remember.

Q. That was the time was it when you was standing in the hall? A. When I was sitting in the hall.

Q. At these other conversations Mr. Hussey had with Harris, you was not present, did not hear what was said between them?

A. No, sir, I was not in the room but a very little.

98 Plaintiff to further maintain the issues on his part called MRS. HARRIS as a witness in rebuttal, who being first duly sworn testified as follows:

Direct Examination

By Mr. Felker:

Q. Are you the wife of the plaintiff, Mr. Harris?

A. Yes, sir.

Q. How long have you been married to him?

A. Twenty-four years in June last.

Q. Lived with him ever since have you? A. Yes, sir.

Q. When did Mr. Harris first commence to use spectacles to read with?

A. I think soon after he went to Missouri to live somewhere in '71, or '72, I think, as near as I can remember.

Q. State whether or not he has continuously used spectacles to read with since that time?

A. I have never seen him read without them at all.

Q. Do you know of your own knowledge whether or not he can read writing or print without the use of spectacles?

Objected to because nobody can tell that of their own knowledge—what another man's ability—

The Court. I don't think you can ask that, sir.

Q. Have you since that time ever seen him read without the use of spectacles?

Objected to because incompetent, immaterial and irrelevant; objection sustained.

99 Q. What was your condition of health at the time when your husband was brought home on the evening of the 30th?

Objected to because incompetent, immaterial,and irrelevant; but the Court overruled said objection; to which ruling of the Court in overruling said objection defendant by counsel then and there excepted.

A. I was ill.

Q. To what extent in regard to being confined to your room?

A. I was in bed and had an experienced nurse; Dr. Hughes was my physician; I was suffering with rheumatism at the time.

Q. Were you able to get out of your room at that time?

A. Not at all, no sir.

Q. Did you hear or converse with your husband after he came home?

A. Do I understand you to mean the night he was brought home—no, sir, I did not; he was not brought up-stairs that night.

Q. How soon afterwards did you, was you able to?

A. As near as I can remember it was near noon Sunday when the nursebrought him up-stairs, and as you go up the steps my door is almost opposite the head of the steps; he just brought him around the corner for an instant that I might speak to him, that was all, and took him in to bed.

Q. Were you able to talk with him from your room into his room?

100 Objected to because immaterial; but the Court overruled said objection; to which ruling of the Court in overruling said objection defendant by counsel then and there excepts.

A. Yes, sir, I talked to him all the time; the doors were only a short distance apart. His room is just at the head of the steps; mine just the other side of the head of the steps; can carry on conversation from there easily.

Q. Could you tell from the conversation you had with him as to whether he was rational, had his mind clear at that time?

Objected to because incompetent, and immaterial; but the Court overruled said objection, to which ruling of the Court in overruling said objection, defendant by counsel then and there excepted.

A. I did not think his mind was as clear as before he was hurt.

Q. Was he under the influence of opiates, and how long?

Objected that the witness can not know whether he was or not.

The Court. I do not think she can answer that, as she was not in the same room.

Q. Was your husband prior to this injury troubled with this shaking paralysis?

Objected to because that is a part of the case in the first instance; counsel can not go into that now.

The Court. Yes, sir, I think it was, that was the case in chief;objection sustained.

101 Cross-Examination of Mrs. Harris

By Mr. Teller:

Q. When do you speak of the time you think he was not as clear? From the time he was brought home?

A. Well, I only can tell you by saying that the morning this last gentleman called upon him the nurse came to my room and asked for morphine to give to him; and I don't think he was clear for probably until in the night; in the night; I can't say positively—I would not like to make oath of that; I didn't think he was, told him so.

Q. You didn't think he was clear?

A. I called to him; I said "You are under the influence of morphine; I should not do anything if I were you until the effects wore off."

Q. What reply did he make?

A. He did not make any reply to me at all.

Q. Had you any other conversation with him of that kind?

A. No, sir, I had not.

Q. That was the first and only thing you said?

A. Yes, sir.

Q. He didn't make any reply at all?

A. Not that I remember.

Q. You did not have any strong ground of opinion, one way or the other?

A. Except he had had this morphine; I knew he was under the influence.

Q. You heard Dr. Hughes testify yesterday he gave him a fourth of a grain, or eighth?

A. No, sir, I did not hear Dr. Hughes' testimony.

Q. Do you know anything about the effects of morphine?

102 A. Only so far as it affects myself, that is all.

Q. Did you ever take morphine?

A. Yes, sir.

Q. To what extent?

A. Really I don't know how much the doctor gave it while I was suffering from rheumatism last summer.

Q. You don't know whether he gave an eighth of a grain or a fourth? A. No, I don't.

Q. How often did he give it?

A. He always gave it to me in the evening, a hypodermic injection for probably ten days or two weeks if I remember right.

Q. Each evening?

A. Yes, sir, I was very nervous, and suffered quite a good deal, could not sleep.

Q. That would make you drowsy, and give you sleep?

A. Sometimes; and sometimes I would have to have some capsules.

Q. Sometimes morphine instead of making you drowsy made you more nervous?

A. No, it did not have that effect upon me.

Q. What did it have?

A. I don't know, I just can tell you, really no use lying about it.

Q. You had to have something else in order to make you sleep? A. Once or twice I did. I am sure.

Q. That experience then is all the knowledge you had [now] morphine would affect anybody? A. My own experience?

Q. Yes?

A. Well, as far as my own feelings were concerned, I have seen other people have morphine.

Q. You don't know how much they used or how often it was taken do you?

103 A. I don't believe I could say positively. I don't want to say anything unless it is so.

Q. At any rate you spoke to your husband that morning, and he did not speak to you at all?

A. Not that I remember, not that I know of, I don't think he answered me.

Q. Were you at the room when this young man Hussey and the other young man came there? A. At my husband's room?

Q. Yes? A. No, sir; I was in my room.

Q. Do you know of the fact of their being there? A. I do.

Q. How many times do you know of their being there?

A. There was one of the gentlemen there twice; at least I say twice, twice in one day; there was a [gentlemen], whether it was the same one or not I could not say, and then again the next morning there was a gentleman came there.

Q. You don't know whether it was the same or not?

A. But there was someone there twice in one day.

Q. But you do recollect there was someone there twice in one day? A. Yes, sir.

Q. Did you have any conversation with him when he was there twice? A. I did not.

Q. Did you request anybody to listen to conversation?

A. I did send my nurse to the door to stand and listen to see what he said.

Q. Then the next day did you know of somebody's being there? A. I did.

104 Q. And did you know of his having an agreement which Mr. Harris was asked to sign? A. I did.

Q. And did you make any request in respect to signing it?

A. That was when I called to him not to sign it.

Q. That was when you called?

A. Yes, I said "You are under the influence of morphine, it has not been over an hour since you took morphine; I don't think you are in any condition mentally to sign any paper.

Q. How did you know he was there for the purpose of signing an agreement?

A. Because—came into my room to ask for pen and ink.

Q. The man did? A. No, the nurse did.

Q. The nurse came in and asked for pen and ink?

A. Yes, sir.

Q. Did she say Mr. Harris wanted the pen and ink?

A. I think she said that the gentleman wanted the pen and ink; I could not say positively, but that is my impression, the gentleman.

Q. At any rate you knew the agreement was about to be signed? A. I knew that that was what he had come for.

Q. You knew that that was the use to which the pen and ink was to be put? A. I supposed so.

Q. Then it was you said to Mr. Harris he should not sign it?

A. I did, I said you are in no condition to sign it.

Q. And he made no reply? A. Not that I remember of.

105 Q. In either of the times when this young man was there, I mean before the instrument was signed, and when he was there twice in one day, did you hear any conversation? A. I did not.

Q. Not at all? A. No, sir.

Q. How do you know then he was there?

A. I saw him pass my door.

Q. Saw him pass your door twice in one day? A. Yes, sir.

Q. How long was that before the contract was signed?

A. The day before.

Q. He was there twice in one day then, was he there another time, was he there on two days?

A. Yes, sir. I won't say it was the same one that was there on two days; there was a gentleman came in the morning and stayed a little while, and he came back again in the afternoon and went away and came back again very shortly and stayed—to me—I think the greater part of the afternoon, so long, I said to the nurse, "That man will worry Mr. Harris nearly to death, and he ought not to be allowed to stay in there."

Q. Do you say he was there three times in one day?

A. Yes, he went away to see Dr. Hughes and came right back.

Q. How do you know he went away to see Dr. Hughes?

A. That is what he said he was going for.

Q. Did you hear him say so?

A. As he went down the steps, as he came out of my husband's room he said "I will see Dr. Hughes," and he came back.

Q. Who came back, the same one?

106 A. I won't say the same one, some man came back.

Q. The same afternoon? A. Yes.

Q. The next day some one came with this agreement?

A. Some one came in the morning.

Q. So according to your idea there were four times in which somebody came there to talk with Mr. Harris about this agreement, three times before it was signed, and once when it was signed?

A. Well, that is the way I remember it, that they came in the morning, came soon after lunch, went right away, came right straight back.

Q. Are you certain he was there three times, the same man was there three times, and that happened before the instrument was signed, are you certain about that?

A. Well, I think I am; I think he came in the morning, he came again in the afternoon, and said he would go and see the doctor. I presume they had some conversation about it. I just heard him say that "I will go down and see Dr. Hughes," as he came down out of my husband's room, went downstairs, then he came right back, went up stairs again, passed my door.

Q. At that time did you know from Mr. Harris or anybody else what his purpose was in visiting Mr. Harris? A. I did.

Q. Did you inquire of Mr. Harris anything about what he proposed to do, what this young gentleman proposed to settle on?

A. Well, just across the hall, in that way I talked to him; he said he [proposed] the company was not responsible.

107 Q. You could not tell what he said, tell whether you heard it?

A. Do you mean I heard them talk; I did not hear what they said to each other at all.

Q. You had from Mr. Harris what the matter was?

A. Yes, sir.

Q. So when he went away to call on Dr. Hughes you and he had conversation in relation to this settlement did you not?

A. Yes, sir.

Q. You are very certain he was there three times; are you equally certain it was three times in one day; or was he there on two different dates; I mean before the agreement was signed?

A. To the best of my recollection the gentleman came in the morning, and again soon after lunch, and went away for a short time and came back.

Q. Now, have you anything particular to refresh your recollection or to make you know whether it was three times in one day, or whether it was once one day, and twice the next day? A. No sir, I have not.

Q. Have you anything—well, I don't know whether I asked you or not, what day was it in your judgment that those three visits were made?

A. To the best of my recollection the first gentleman that came, came on Monday; that is my impression, as far as I can remember it was Monday that he came.

Q. And that was the time you made the three visits?

A. Yes, sir.

Q. Have you anything to refresh your recollection, or to make you certain about the day of the week?

A. No, sir, I have not.

108 Q. Nor the day of the month?

A. No, sir, I have not.

Q. But he came there, anyhow he came there and went down to see Dr. Hughes? A. Yes, sir.

Q. And said he was going down and came back?

A. Yes, sir.

Q. And then the next day after that this written instrument was presented?

A. To the best of my recollection it was.

Q. That is your recollection? A. Yes, sir.

Plaintiff to further maintain the issues on his behalf called as a witness DR. T. A. HUGHES, who further testified in rebuttal as follows:

Direct Examination

By Mr. Felker:

Q. Did you tell Mr. Hussey that Mr. Harris would be out and around attending to his business in two weeks, and that 250 dollars was sufficient to compensate him for his expenses?

Objected to because not rebuttal; but the Court overruled said objection; to which ruling of the Court in overruling said objection, defendant by counsel then and there excepted.

A. No, I did not tell him anything of the sort.

Q. Did Dr. Lyman tell you after this agreement was signed that the agent had no business to go around to Mr. Harris to get him to sign it, that he was in no condition to do business?

Objected to; objection sustained.

The Court. That is not a material question.

109 Mr. Teller. I don't think there was anything asked Mr. Hussey about that.

The Court. Yes, sir.

Cross-Examination of Dr. Hughes

By Mr. Teller:

Q. Did you and Mr. Hussey have any conversation about the settlement of this claim? A. We did.

Q. Was there anything said in that conversation about how long it would be before the man would probably be out?

A. Mr. Hussey came direct to me from Mr. Harris, and told me that Mr. Harris had sent him to me for the purpose of settling. I told him I wished him distinctly to understand I was not Mr. Harris' lawyer; I had no authority to settle anything with him; I said, "If you get off of this thing with an annual pass and five hundred dollars you can consider yourself very fortunate indeed; that was what I told him.

Q. That was all that was said about it?

A. Yes, sir, that was all.

Q. Did you talk with Dr. Lyman about the time which this man would probably be laid up? A. Yes sir, I did.

Q. When was that?

A. The night after the injury, on the 31st, Sunday.

Q. What was the nature of that conversation?

Objected to because not proper cross-examination; but the Court sustained said objection; to which ruling of the Court in sustaining said objection defendant by counsel then and there excepted."

110

Mr. Teller. "I want to make a motion that the Court instruct the jury that there is not sufficient evidence to show any fraud on the part of the defendant; that the fact which he admits that he had this instrument in his hands, that he could read, that he had the opportunity to read and that he signed it is such evidence of his knowledge of the contents as estops him at this time from denying it, and that the release being thus admitted is a complete bar to the action. But the Court overruled said motion; to which ruling of the Court in overruling said motion defendant by counsel then and there excepted.

Mr. Teller. Second, I want the Court to instruct the jury that in view of the evidence in this case, the defendant is not liable for any damages; that if anybody is liable, it is The Silver Age Milling Company. But the Court overruled said motion and refused to instruct the jury as requested by defendant's counsel; to which ruling of the Court in overruling said motion defendant by counsel then and there excepted."

111 The Court thereupon instructed the jury as follows:

"In the consideration of this case, [gentleman], it will be more convenient to refer to the question of the release made by plaintiff to the defendant company first, although in its logical order that might perhaps be regarded as a question to follow the principal question as to the merits of the case."

"A release of this kind is of the highest significance in general when it appears that the situation and circumstances of the parties show that it has been entered [unto] with an understanding of the rights of the parties respectively, and with intent to include all matters of difference between them."

"This is so far true, that when the parties are upon an equal footing, and there seems to be no reason to believe that any [respect] has been made in respect to it, that neither party is at liberty to deny the force and effect of what it may contain; he is not at liberty to say that he did not read it or that he did not understand it."

The Court also further instructed the jury as follows:

"But the Court has some regard to the infirmities of men, and when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded."

To the giving of which last instruction, defendant, by its counsel then and there excepted.

"In this instance, the plaintiff having been injured on a certain day in July, the 30th day of July I think, and while he was lying in bed apparently quite ill, was approached by an agent of the defendant company and was induced to sign the release which has been put in evidence before you."

112 The Court also instructed the jury as follows:

"And upon that it becomes a question in the first instance whether he was in a condition to know precisely what he was doing. He seems to have had in some degree and to some extent the possession of his faculties; he had used whiskey at the time of the accident or shortly afterwards, and morphine had been administered to him on several occasions. There is a question as to the effect of the accident, how far he was disabled by it, and as to the effect of the drug and of the whiskey, perhaps, on his mind; whether he was then in a condition to deal with such a subject as was presented to him. If he was not, and you can say that his faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed, you may say he is not to be charged with it."

To the giving of which said last-mentioned instruction, the defendant, by its counsel, then and there excepted.

And the Court further instructed the jury as follows:

"And aside from that, if there was a misunderstanding of the facts, whether the facts were wilfully misstated by the agent of the railway company or not, is not a very material question; but the question is whether the facts were understood by both parties. Upon that the agent of the railway company says that he only spoke in a general way of making a settlement. His language was such as to comprehend all matters that were in difference between them, while plaintiff says that he was not asked to consider nor did he consider the question of the liability of the railway company to him for the injury which he had received, but that the mining company to whom the car had been delivered, and which was in some degree responsible for placing the car in a position in which it would come down upon the track and there throw the train, as it did in fact; that the mining company was liable to him for the injury, and not the railway company."

113 To the giving of which said last-mentioned instructions, defendant, by its counsel, then and there excepted. Thereupon, the Court further instructed the jury as follows:

"The plaintiff says that in reckoning up what should be paid to him, they considered only the question in respect to his illness, his doctor's bill and the like, and the loss of time for two weeks. Now, if you accept this as the truth, that is to say, if you accept plaintiff's account of the negotiation between them as against that of the agent of the railway company, then it would appear that the plaintiff, at least, did not understand the subject-matter of the negotiation, and as to what is expressed in the release he says that he did not read it and could not read it without his spectacles, and that he did not have them at the time this paper was given to him."

To the giving of which last-mentioned instruction, defendant, by its counsel, then and there excepted.

The Court further instructed the jury as follows:

"As I have said to you before, under some circumstances a man in full health and accustomed to the transaction of business executing such a paper as that, would not be at liberty to deny his knowledge of its contents; but with one in the situation of plaintiff, lying on his bed and somewhat prostrated by the shock which occurred at the time of the accident, he may be excused from reading it if he did not in fact read it. I think that the agent of the railway company says that he did read it, or that he appeared to him to read it. He is not willing to say that the plaintiff had his spectacles at that time, if I understood him correctly he does not remember whether he had or had not his spectacles."

114 To the giving of which said last-named instruction, defendant, by its counsel, then and there excepted.

Thereupon, the Court further instructed the jury as follows:

plaintiff omitted to read, if he failed to read it under the circumstances disclosed, he may be excused because he was in some pain, misery, and perhaps, to some extent under the influence of morphine which he had taken."

To the giving of which said last-mentioned instruction, defendant, by its counsel, then and there excepted.

Thereupon, the Court further instructed the jury as follows:

"And so this presents the matter, whether the parties understood, that is the plaintiff understood at this time the facts on which apparently the agent of the railway company was proceeding in asking a settlement of the matter in issue between them; and if the plaintiff understood it to be a settlement only for the expenses of his illness and the time of two weeks which he would possibly be confined to his bed or to the house and to nothing more, the paper will not be operative against him in respect to the damage which he may seek in an action of this kind."

To the giving of which said last-mentioned instruction, defendant, by its counsel, then and there excepted.

Thereupon, the Court further instructed the jury as follows:
"And so also, if he understood that the company was
115 not liable in this action, but that the mining company
to whom the car was consigned was liable and not the Railway Company upon this point—for I do not think it necessary to say anything more to you upon it—it is for your con-

sideration whether the plaintiff was in a state of mind and body to transact such business as this at the time it was done, and whether if he was in such a state of mind and body that he might transact it in some fashion, the facts were understood by him; that is to say whether he knew that he was settling the entire controversy as it lay between himself and the Railroad Company in respect to the accident.

To the giving of which deft. by its counsel then & there excepted.

If he did, if he understood what he was doing and understood that he was making a settlement of the whole business, the entire matter between himself and the Railroad Company, then he is bound by the settlement without regard to the amount of money which he received. The sum paid was $250.00, I believe, and the promise of something in the way of transportation for going to New Mexico. The amount paid is not significant. If the settlement was made with a full understanding of the rights of the parties, the plaintiff then being in a state of health to enable him to transact such business, and and upon that you say that the settlement is binding upon the plaintiff, he is concluded of this action, and you need make no further inquiry in respect to it; that is to say, his action can not be maintained."

Thereupon, the Court instructed the jury as follows:

"But if you say that the paper ought not to be regarded as concluding him in respect to his right of action, we then come to he question whether there was negligence on the part of the railroad company through which the car was overturned to the hurt of the plaintiff; and upon that there is no room for controversy, notwithstanding the fact that this car was delivered to the mining company filled with coal, and for the 116 use of the mining company, and that it would seem from the evidence that after unloading the car, it was not sufficiently fastened in respect to the brakes; perhaps it was necessary to block the wheels also in such a place as that; but that whatever was necessary to keep it securely in place upon the side track was not done, and it moved down upon the track so as to overthrow the cars in the train which came down with the plaintiff. The act of negligence of the servants of the mining company is to be ascribed to the defendant."

To the giving of which said last-mentioned instruction, defendant, by its counsel, then and there excepted.

Thereupon, the Court further instructed the jury as follows: "In other words, the railway company as to its passengers is bound to keep its track clear from obstructions of this kind;

to see that the cars which it uses on side tracks are secured in place so that they will not come upon the track to overthrow any train that may come along; and there seems to be no question but that the car in which plaintiff was riding was overthrown by the freight car coming down from the switch or side track and on to the main track in collision with the cars of the train which carried the plaintiff."

To the giving of which last mention- instruction def. by its counsel the- & the- excepted.

The Court also instructed as follows:

"And so upon that we come to the question of the extent of the plaintiff's injuries; and that is a matter for serious consideration, because it is maintained although he was hurt at the time, that the infirmity which is now upon him was not caused by the injury, but came from other causes. That he had palsy with which he is now afflicted before the injury came to him; and that it is progressing in the usual way, and has reached its present stage without reference to the injury which
117 he sustained That is a question for your consideration.
You have heard the testimony of a number of physicians, and you are to decide whether the plaintiff's present infirmity comes of the injury which he received by being thrown out of the car; that is to say, upon all the evidence which you have heard, if you are of the opinion that it is to be ascribed to the injury, you may allow him damages for his disability. He can have damages for the immediate effects of the injury whether the infirmity he now has comes of it or not, and for the attendance of his physicians and cost of his illness while suffering immediately from the injury; that is, within the time of a few weeks from the date of the accident."

The Court also instructed the jury as follows:

"The position of the plaintiff is that his present disability which seems to be well nigh complete—he seems to be so infirm so far as we may judge of him that he can do nothing, and he has become almost helpless, may be directly traced to the injury which he received when he was thrown from the car. And that is a matter for your consideration. If that is true, he may have, as I said to you before, the cost of his medical attendance, his physicians and of the pain and suffering he endured—what you may think is a reasonable allowance for him, and for his disability up to this time, and onwards.".

To the giving of which said last-mentioned instruction, defendant, by its counsel, then and there excepted.

Thereupon, the Court further instructed the jury as follows: "It is said that he will never be in good health again. With reference to his disability, that is considered only with reference to his power to earn money. He was earning at the time of the injury $125.00 per month, or $1500.00 a year, and if we had testimony, which is often given in these cases, as to
118 his expectation of life, how long he would live—that is, how long a person 52 years old will live according to the tables of insurance men, we would go upon them, and advise that you could give him such sum during his life. But as you have not that, you must go upon your knowledge in regard to men, how long life will last with persons who have reached his age, and determine as best you can what he ought to receive.

In this stage of the case, I am somewhat concerned as to the amount which you may give . I have only to say that you can not give anything like the sum which the plaintiff has claimed in his complaint. Courts do not advise juries as to the amount as that is peculiarly in their province to determine; but we ask you to be reasonable in these things, if you decide to make an allowance to him. He was not a man of large income; no doubt he was efficient in his business, but he was in a business in which the earnings were not considerable apparently. He does not state what he had received at any time during his long service, but he was getting $125.00 a month at the time he was injured, and you must decide, if you decide for him, what a man, whose earnings are of that nature, ought to receive in a lump sum in respect to a matter of this kind."

"I think, gentlemen, that is all I have to say to you."

Mr. Felker. I would ask the Court to charge that if the jury believe that the plaintiff understood this agreement to be only for his expense of sickness and loss of time for two weeks, and that they have under our pleadings, the jury ought not to take into consideration this sum of $250.00, or for the loss of time for that two weeks, and for the expense of his sickness for the two weeks, we do not ask anything for that two weeks in our pleadings."

Mr. Teller. "There is no exception made in the pleadings."

119 The Court. "I think the true rule in respect to that gentlemen is that if you make an allowance to plaintiff, you are to deduct from it what he has received. You are to deduct $250 from anything you may allow him."

Mr. Teller. "I ask an exception to that, your Honor. The other exceptions may be taken in the usual form."

The Court. "Yes sir, if you desire to have any especial expression, language that has been used corrected, I would like to have attention called to it; but as to the general propositions advanced, you can except to them at any time."

Mr. Teller. "Most of them are as to the general expression."

The Court. "As to the general principles, you can except at any time."

Thereupon, the jury retired to consider their verdict.

Thereupon, and on the 19th day of July, 1892, the jury rendered their verdict in favor of the plaintiff and against the defendant for the sum of $6500.00.

Thereupon, defendant filed its motion for new trial in the words and figures following, to wit:

120 "Now comes the defendant, and moves the Court to set aside the verdict of the jury in said case, and to grant a new trial, and assigns the following reasons therefor:

First. The Court erred in the admission of incompetent, improper and immaterial testimony offered by the plaintiff.

Second. The Court erred in rejecting competent, material and relevant testimony offered on behalf of the defendant.

Third. The Court erred in refusing to instruct the jury as requested by defendant's counsel at the close of the testimony.

Fourth. The Court erred in instructing the jury on its own motion.

Fifth. The verdict is not supported by the evidence.

Sixth. There is not sufficient evidence to support the verdict.

Seventh. The verdict is against the evidence and contrary to law."

And thereafter, and on to wit, the 10th day of August, 1893, said motion for new trial coming on to be heard, the same was argued before the Court, and taken under advisement.

And thereafter, and on to wit, the 23rd day of August, 1893, the Court overruled said motion for new trial, and entered judgment on the verdict of the jury for the sum of $6500.00; to which ruling of the Court in overruling said motion for new trial, and entering judgment on the verdict of the jury, defendant, by its counsel, then and there excepted.

And forasmuch as the foregoing matters and things do not fully appear of record herein, the defendant makes and tenders this its bill of exceptions, and asks that the same may be signed, sealed and filed and made a part of the record
121 herein, which is done accordingly, this 18th day of October 1893.

By the Court:

MOSES HALLETT, Judge. [Seal]

Interlineations made by us from stenographers Ex. of testimony.

FELKER & DAYTON,
Attorneys for Plaintiff.

Indorsed. No. 2865. Circuit Court. Robert E. Harris vs. The Union Pacific Railway Company. Bill of Exceptions. Filed Oct. 20, 1893. Robert Bailey, Clerk U. S. Circuit Court. Teller, Orahood & Morgan, Attorneys for Deft.

122 The United States of America, District of Colorado.

Know All Men by These Presents, That we, Harper M. Orahood and Edward B. Morgan are held and firmly bound unto Robert E. Harris in the full and just sum of Two Hundred and Fifty Dollars, to be paid to the said Robert E. Harris his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of October in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at the May Term, A. D. 1893, of the Circuit Court of the United States, for the District of Colorado, in a suit pending in said court between Robert E. Harris plaintiff, and The Union Pacific Railway Company, defendant, — was rendered against the said The Union Pacific Raiway Company, and the said The Union Pacific Railway Company, having obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment of the said court and a citation directed to the said Robert E. Harris citing and admonishing him to be and appear, in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after date of said citation.

123 Now, the Condition of the above obligation is such, that if the said The Union Pacific Railway Company,

shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY.

Sealed and delivered in the presence of

S. H. H. CLARK,
OLIVER W. MINK, [Seal]
E. ELLERY ANDERSON,
Receivers.
By HARPER M. ORAHOOD, [Seal]
Attorney in Fact.
HARPER M. ORAHOOD, [Seal]
EDWARD B. MORGAN. [Seal]

Approved Oct. 28th 1893.

MOSES HALLETT, Judge.

JUSTIFICATION.

The United States of America,
District of Colorado—ss.

Harper M. Orahood and Edward B. Morgan sureties, on the within bond, being each first duly sworn, deposes and saith that he is worth in assets the sum below set opposite his name, that is to say: over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

HARPER M. ORAHOOD.
EDWARD B. MORGAN.

124 Subscribed and sworn to before me, at Denver, this 21st day of October A. D. 1893.

[Seal] CHARLES M. SPERRY,
Notary Public.

My commission expires January 12 1893.

Indorsed. Gen. No. 2865. Circuit Court of the United States, District of Colorado. Robert E. Harris vs. The Union Pacific Railway Company. Bond on Writ of Error for Costs. $250.00. Filed this 28th day of October A. D. 1893. Robert Bailey Clerk.

The United States of America, District of Colorado.

Know All Men by These Presents, That we, Harper M. Orahood and Edward B. Morgan are held and firmly bound unto Robert E. Harris in the full and just sum of Two Hundred and Fifty Dollars, to be paid to the said Robert E. Harris his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21 day of October in the year of our Lord one thousand eight hundred and ninety-three.

125 Whereas, lately at the May term, A. D. 1893, of the Circuit Court of the United States, for the District of Colorado, in a suit pending in said court between Robert E. Harris plaintiff, and The Union Pacific Railway Company, defendant, — was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company having obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment of the said court and a citation directed to the said Robert E. Harris citing and admonishing him to be and appear, in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the Condition of the above obligation is such, that if the said The Union Pacific Railway Company, shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY.

Sealed and delivered in presence of

S. H. H. CLARK,
OLIVER W. MINK, [Seal]
E. ELLERY ANDERSON,
Receivers.

By HARPER M. ORAHOOD, [Seal]
Attorney in Fact. [Seal]
HARPER M. ORAHOOD, [Seal]
EDWARD B. MORGAN. [Seal]

Approved Oct. 28th 1893.

MOSES HALLETT, Judge.

126 JUSTIFICATION.

The United States of America,
District of Colorado—ss.

Harper M. Orahood and Edward B. Morgan sureties, on the within bond, being each first duly sworn, deposeth and saith that he is worth in assets the sum below set opposite his name, that is to say, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

HARPER M. ORAHOOD.
EDWARD B. MORGAN.

Subscribed and sworn to before me, at Denver, this 21st day of October A. D. 1893.

[Seal] CHARLES M. SPERRY,
Notary Public.

My commission expires January 12 1893.

Indorsed. Gen. No. 2865. Circuit Court of the United States, District of Colorado. Robert E. Harris vs. The Union Pacific Railway Company. Bond on Writ of Error for Costs—$250.00. Filed this 28th day of October A. D. 1893. Robert Bailey, Clerk.

127 WRIT OF ERROR, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

The United States of America.

United States of America,
District of Colorado—ss.

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Colorado—greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the May term, 1893, thereof, between Robert E. Harris, plaintiff, and The Union Pacific Railway Company, Defendant, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United [Stated] Circuit Court of Appeals, for the Eighth Circuit, on or before the 4th day of April, 1894, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of February, in the year of our Lord, one thousand eight hundred and ninetyfour and of the Independence of the United States the 118th year. Issued at office in Denver, in said District, with the seal of the Circuit Court of the United States, for the District of Colorado, and dated as aforesaid.

Seal of the
United States Circuit
Court, District
of Colorado.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado.

Allowed by

MOSES HALLETT, Judge.

128 Gen. No. 2865. United States Circuit Court of Appeals, Eighth Circuit. The Union Pacific Railway Company, Plaintiff in Error, vs. Robert E. Harris, Defendant in Error. Writ of Error. To Circuit Court, U. S. District of Colorado. Filed in United States Circuit Court, District of Colorado, this 3d day of February A. D. 1894. Robert Bailey, Clerk. Teller, Orahood and Morgan, Attorneys for Plaintiff in Error.

129 In the Circuit Court of the United States, District of Colorado.

ASSIGNMENT OF ERRORS.

Robert E. Harris, Plaintiff,
vs.
The Union Pacific Railway Company, Defendant.

Now comes the said, The Union Pacific Railway Company, defendant, and says that in the record and proceedings herein there is manifold error, in this, to wit:

1. The Court erred in allowing the witness, Hussey, on cross-examination, to answer the question, whether plaintiff appeared to rely upon the statement that witness said he made to plaintiff, that he (witness) thought the company defendant was not liable for the injury to plaintiff; the question being, "Did he appear to rely upon your statement then",—the objection being that the statement was but an expression of a legal opinion by the witness.

2. The Court erred in allowing the plaintiff, as a witness, to be interrogated and examined, by showing plaintiff the release executed by him and asking him: "Now can you read any portion of that at the present time without spectacles"? such question and answer being objected to by the defendant, that such evidence was incompetent, and the defendant duly excepting.

3. The Court erred also in allowing the plaintiff, as a witness, to testify, against defendant's objection, after witness
130 had put on his spectacles, as to whether he could
read the coarse and fine print of the release, and as to whether his eyesight was as good then as it was when release was presented to him.

4. The Court erred in allowing the witness to answer the question: "Well, could you at the time the paper was presented to you, have read any portion of that paper without your glasses?" and in allowing the witness to answer, the answer being: "Oh no, sir, I could not; not a word of it," the defendant objecting to such question and answer, and exception being duly taken.

5. The Court erred in allowing the following question to be put and answered by the plaintiff: "Were you at the time of signing that (the release) conscious that you were signing any agreement other than for your expenses of sickness and loss of time for two weeks," the defendant having objected to the question, and duly excepting thereto.

6. The Court erred in allowing the plaintiff's wife, to be asked, and in allowing witness to answer as to what her condition of health was at the time her husband was brought home on the 30th of August, and also in allowing said witness to be asked, and in allowing her to answer, whether she was able to talk with him from her room to the room where plaintiff lay, and also in allowing witness to answer the question: "Could you tell from the conversation you had with him as to whether he was rational and had his mind clear at that time?"

131 7. The Court erred in overruling the motion of defendant, at the close of the testimony, that the release and facts shown in evidence made the release a complete bar to the plaintiff's action.

8. The Court erred in refusing to instruct the jury on motion of defendant, that in view of the evidence the defendant was not liable to the plaintiff for damages, and that if any one was liable it was The Silver Age Milling Company.

9. The Court erred in this, that after having stated to the jury correctly the rule of law applicable to the facts in the case, it added:

"But the Court has some regard to the infirmities of men, and when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded."

10. The Court erred in further instructing the jury in words following, to wit:

"And upon that it becomes a question in the first instance whether he was in a condition to know precisely what he was doing. He seems to have had in some degree and to some extent the possession of his faculties; he had used whiskey at the time of the accident or shortly afterwards, and morphine had been administered to him on several occasions. There is a question as to the effect of the accident, how far he was disabled by it, and as to the effect of the drug and of the whiskey, perhaps, on his mind; whether he was then in a condition to deal with such a subject as was presented to him. If he was not, and you can say that his faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed, you may say he is not to be charged with it."

132 11. The Court erred in further instructing the jury, as follows, to wit:

"And aside from that, if there was a misunderstanding of the facts, whether the facts were wilfully misstated by the agent of the railway company or not, is not a material question; but the question is whether the facts were understood by both parties. Upon that the agent of the railway company says that he only spoke in a general way of making a settlement. His language was such as to comprehend all matters that were in difference between them, while plaintiff says that he was not asked to consider nor did he consider the question of the liability of the railway company to him for the injury which he had received, and that the mining company to whom the car had been delivered, and which was in some degree responsible for placing the car in a position in which it would come down upon the track and there throw the train, as it did in fact; that the mining company was liable to him for the injury, and not the railway company."

12. The Court erred in further instructing the jury as follows, to wit:

"The plaintiff says that in reckoning up what should be paid to him they considered only the question in respect to his illness, his doctor's bill and the like, and the loss of time for two weeks. Now, if you accept this as the truth, that is to say, if you accept plaintiff's account of the negotiation between them as against that of the agent of the railway company, then it would appear that the plaintiff, at least, did not understand the subject-matter of the negotiation, and as to what is expressed in the release, he says that he did not read it and could not read it without his spectacles, and that he did not have them at the time this [papers] was given to him."

13. The Court erred in further instructing the jury as follows, to wit:

133 "As I have said to you before, under some circumstances a man in full health and accustomed to the transaction of business executing such a paper as that, would not be at liberty to deny his knowledge of its contents, but with one in the situation of plaintiff, lying on his bed and somewhat prostrated by the shock which occurred at the time of the accident, he may be excused from reading if he did not in fact read it. I think that the agent of the railway company says that he did read it, or that he appeared to him to read it. He is not willing to say that the plaintiff had his spectacles at that time, if I understood him correctly he does not remember whether he had or had not his spectacles."

14. The Court erred in further instructing the jury as follows, to wit:

"What I have to say to you upon that point is that if the plaintiff omitted to read, if he failed to read it under the circumstances disclosed, he may be excused because he was in some pain, misery, and perhaps, to some extent under the influence of morphine which he had taken."

15. The Court erred in further instructing the jury as follows, to wit:

"And so this presents the matter, whether the parties understood, that is the plaintiff understood at this time the facts on which apparently the agent of the railway company was proceeding in asking a settlement of the matter in issue between them; and if the plaintiff understood it to be a settlement only for the expenses of his illness and the time of two weeks which he would [possible] be confined to his bed or to the house and to nothing more, the paper will not be operative against him in respect to the damage which he may seek in an action of this kind."

16. The Court erred in further instructing the jury as follows, to wit:

"And so also, if he understood that the company was
134 not liable in this action, but that the mining company to
whom the car was consigned was liable and not the railway company upon this point—for I do not think it necessary to say anything more to you upon it—it is for your consideration whether the plaintiff was in a state of mind and body to transact such business as this at the time it was done, and whether if he was in such a state of mind and body that he might transact it in some fashion, the facts were understood by him; that is to say whether he knew that he was settling the entire controversy as it lay between himself and the railroad company in respect to the accident.

17. The Court erred in further instructing the jury as follows, to wit:

"But if you say that the paper ought not to be regarded as concluding him in respect to his right of action, we then come to the question whether there was negligence on the part of the railroad company through which the car was overturned to the hurt of the plaintiff; and upon that there is no room for controversy, notwithstanding the fact that this car was delivered to the mining company filled with coal, and for the use of the mining company, and that it would seem from the evidence that after unloading the car, it was not sufficiently fastened in respect to the brakes; perhaps it was necessary to block the wheels also in such a place as that; but that whatever was necessary to keep it securely in place upon the side track was not done, and it moved down upon the track so as to overthrow the cars in the train which came down with the plaintiff. The act of the negligence of the servants of the mining company is to be ascribed to the defendant."

18. The Court erred in further instructing the jury as follows, to wit:

"In other words, the railway company as to its passengers is bound to keep its track clear from obstructions of this kind;
to see that the cars which it uses on side tracks are se-
135 cured in place so that they will not come upon the track
to overthrow any train that may come along; and there seems to be no question but that the car in which plaintiff was

riding was overthrown by the freight car coming down from the switch or side track and on the main track in collision with the cars of the train which carried the plaintiff."

19. The Court erred in further instructing the jury as follows, to wit:

The position of the plaintiff is that his present infirmity comes of the injury which he received by being thrown out of the car; that is to say, upon all the evidence which you have heard, if you are of the opinion that it is to be ascribed to the injury, you may allow him damages for his disability. He can have damages for the immediate effects of the injury whether the infirmity he now has comes of it or not, and for the attendance of his physicians and cost of his illness while suffering immediately from the injury; that is, within the time of a few weeks from the date of the accident."

20. The Court erred in matters arising out of request of plaintiff's counsel as shown in the bill of exceptions in words following, to wit:

"I would ask the Court to charge that if the jury believe that the plaintiff understood this agreement to be only for his expense of sickness and loss of time for two weeks, and that they have under our pleadings, the jury ought not to take into consideration this sum of $250.00, or for the loss of time for that two weeks, and for the expense of his sickness for the two weeks we do not ask anything for that two weeks in our pleadings."

21. The Court erred in overruling the motion for a new trial. The said defendant therefor prays that the said judgment be reversed.

TELLER, ORAHOOD & MORGAN,
Attorneys for U. P. Ry. Co.

136 Indorsed. No. 2865. Circuit Court. Robert E. Harris vs. The Union Pacific Railway Company. Assignment of Errors. Filed Feb. 10 1894. Robert Bailey Clerk U. S. Circuit Court. Teller, Orahood & Morgan, Attorneys for Deft.

The United States of America, District of Colorado.

Know All Men By These Presents, That we, The Union Pacific Railway Company, principal, and Willard Teller and Harper M. Orahood sureties are held and firmly bound unto Robert E. Harris in the full and just sum of Two Hundred and Fifty Dollars, to be paid to the said Robert E. Harris his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirteenth day of February in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately at the May Term, A. D. 1893, of the Circuit Court of the United States, for the District of Colorado, in a suit pending in said court between Robert E. Harris, plaintiff, and The Union Pacific Railway Company, defendant, judgment was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company, having obtained a writ of error to the United States
137 Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment of the said Court and a citation directed to the said Robert E. Harris citing and admonishing him to be and appear, in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said The Union Pacific Railway Company, shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY.
By WILLARD TELLER, [Seal]
Its Attorney in fact. [Seal]

Sealed and delivered in presence of
WILLARD TELLER. [Seal]
HARPER M. ORAHOOD. [Seal]

Approved.

MOSES HALLETT, Judge.

JUSTIFICATION.

The United States of America,
District of Colorado—ss.

Willard Teller and Harper M. Orahood sureties, on the within bond, being each first duly sworn, deposes and saith that he is worth in assets the sum below set opposite his name, that is to say, as to assets, Five Hundred Dollars, over and above all his just debts and liabilities, and in property
138 subject to levy and sale upon execution.

WILLARD TELLER,
HARPER M. ORAHOOD.

Subscribed and sworn to before me, at Denver, this 13th day of February A. D. 1894.

[Seal] CHARLES M. SPERRY,
Notary Public.

My commission expires January 12 1897.

Indorsed. Gen. No. 2865. Circuit Court of the United States, District of Colorado. Robert E. Harris vs. The Union Pacific Railway Company. Bond on Writ of Error. $250. Filed this 13th day of February A. D. 1894. Robert Bailey Clerk.

139 CITATION, UNITED STATES CIRCUIT COURT OF APPEALS.

The United States of America, District of Colorado.

The United States of America, to Robert E. Harris or to Felker and Dayton, his attorneys, greeting:

You are herby cited and admonished to be and appear, in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States, for the District of Colorado, sitting at Denver, in said district,whereinTheUnion Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Moses Hallett, Judge of the Circuit Court of the United States for the District of Colorado, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-four.

MOSES HALLETT,
Judge of Circuit Court United States, District of Colorado.

140 PROOF OF SERVICE.

United States of America,
District of Colorado— ss.

On this 13th day of February, A. D. 1894, personally appeared C. M. Sperry before me, the subscriber, Clerk of the Circuit Court of the United States, for the District of Colorado, and makes oath that he delivered a true copy of the within citation to William L. Dayton, one of the firm of Felker & Dayton, attorneys for the plaintiff in the within-entitled cause on this 13th day of February 1894 at the City of Denver Colorado.

C. M. SPERRY.

Sworn to and subscribed before me, this 13th day of February, A. D. 1894.

ROBERT BAILEY, Clerk.

Gen. No. 2865. United States Circuit Court of Appeals, Eighth Circuit. The Union Pacific Railway Company, Plaintiff in Error, vs. Robert E. Harris, Defendant in Error. Citation. Filed in United States Circuit Court for the District of Colorado, his 13th day of February, A. D. 1894. Robert Bailey, Clerk. Teller, Orahood & Morgan, Attorneys for Plaintiff in Error.

141 United States of America,
District of Colorado—ss.

I, Robert Bailey, Clerk of the Circuit Court of the United States for the District of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the record and proceedings and all thereof heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Robert E. Harris was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file or of record in my office at Denver.

Seal of the
United States Circuit
Court, District
of Colorado.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fourteenth day of February A. D. 1894.

ROBERT BAILEY, Clerk.

Filed Apr. 2 1894. John D. Jordan, Clerk.

93 *Appearance for Plaintiff in Error.*

And on the sixth day of April, A. D. 1894, an appearance of counsel for plaintiff in error was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

UNION PACIFIC RAILWAY Co., Plaintiff in Error,
vs.
ROBERT E. HARRIS, Defendant in Error.
} No. 439.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

JOHN M. THURSTON.
WILLARD TELLER.
H. M. ORAHOOD.
E. B. MORGAN.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 439. Union Pacific R'y Co., plaintiff in error, *vs.* Rob't E. Harris. Appearance. Filed April 6, 1894. John D. Jordan, clerk. John M. Thurston, Teller, Orahood & Morgan, counsel for plaintiff in error.

Appearance for Defendant in Error.

And on the twenty-fifth day of June, A. D. 1894, an appearance of counsel for defendant in error was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ROBERT E. HARRIS.
} No. 439.

94 The clerk will enter our appearance as counsel for the defendant in error.

WILLIAM B. FELKER.
WILLIAM L. DAYTON.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 439. Union Pacific Railway Co., pl'ff in error, *vs.* Robert E. Harris. Appearance. Filed June 25, 1894. John D. Jordan, clerk. Wm. B. Felker, Wm. L. Dayton, Denver, Col., counsel for defendant in error.

Order of Submission.

And on the twenty-fourth day of September, A. D. 1894, in the record of the proceedings of the said circuit court of appeals, at the May term, 1894, thereof, is an order of submission of said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs. No. 439.
ROBERT E. HARRIS, Defendant in Error.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in its regular order, the same was argued by Mr. Willard Teller for plaintiff in error and by Mr. John G. Felker for defendant in error.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

Opinion.

And on the eighth day of October, A. D. 1894, an opinion of said circuit court of appeals was filed in said cause in the following words, to wit:

95 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ROBERT E. HARRIS, Defendant in Error.
No. 439. In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Willard Teller (Mr. Harper M. Orahood, Mr. E. B. Morgan and Mr. John M. Thurston were with him on the brief) for plaintiff in error.

Mr. William B. Felker (Mr. William L. Dayton was with him on the brief) for defendant in error.

Before Caldwell, Sanborn and Thayer, circuit judges.

CALDWELL, *J.*, delivered the opinion of the court:

This action was brought in the circuit court of the United States for the district of Colorado by Robert E. Harris against The Union Pacific Railway Company to recover for personal injuries received by him while he was a passenger on defendant's train. The plaintiff recovered judgment in the circuit court, and the defendant sued out this writ of error.

The complaint alleged, in substance, that the company ran one or more of its freight cars out on its side track, known as the Silver Age Mill siding, and negligently left the same in such a position that they obstructed the main track, or that they were left in an insecure and unsafe position on the side track and negligently permitted to run upon the main track, so that when the train upon which the plaintiff was a passenger came along it ran into 96 these freight cars, derailing and wrecking to pieces the car in which the plaintiff was riding and inflicting upon him serious and permanent injuries to his mind and body. In its original answer the defendant denies generally all negligence, but "admits that it had standing upon its side track at about the place mentioned in said complaint one or more freight cars; but denies that the said freight cars were left insecure or unsafe or in such a position as to interfere with the passage of the train of cars upon which the plaintiff was riding." The proof is plenary that the accident was caused by the passenger train coming in collision with the freight cars on this siding in the manner set out in the complaint. The defendant in its answer admits "that it had standing upon its side track" the freight cars in question, and rests its defense on the issue of negligence solely upon a denial of the charge that the freight cars were left on the side track in an insecure or unsafe position or in such a position as to interfere with the passenger train. The answer contains no allegation or suggestion that any other company had any control over this side track or these freight cars, or that any other company was in any manner responsible for the negligence which resulted in the collision. Upon this state of the pleadings and proofs it was not error for the lower court to tell the jury there was no room for controversy over the question of the defendant's negligence. The remark of the learned judge who tried the case at circuit that "the act of negligence of the servants of the mining company is to be ascribed to the defendant," must be read in connection with that portion of the charge which precedes and follows it, and when so read it means that if the defendant committed the management and control of its cars on its side track to the servants of the mining company their negligence was to be ascribed to the defendant. Further consideration of this issue is unnecessary, as we understand the learned counsel for the plaintiff in error upon the argument to concede defendant's negligence was sufficiently established.

The defendant filed a supplemental answer in which it pleaded in bar of the action a release executed by the plaintiff four or five days after the accident, by the terms of which he acknowledged the receipt of two hundred and fifty dollars in full settlement of the injuries he received and the property he lost by the accident, "and in full of all claims and demands of whatsoever character." To this defense the plaintiff replied first, that at the time he executed the release he was not mentally capable of making a contract; and second, that the release was obtained from him by fraud; that the defendant's agents represented to him that the defendant was not liable to the plaintiff for the injuries he had sustained because, as

they asserted, the accident was caused by the negligence of another company that had charge of the side track and freight cars and which was alone responsible for the injury sustained by the plaintiff; that the defendant's agents further represented to the plaintiff that the paper he was asked to sign was only a receipt for the amount of what it was estimated the medical services rendered him
would cost, and for the expenses of sickness and loss of time
97 for two weeks and for nothing else, and that he signed the
paper relying on the truth of these representations being unable to read it himself and no one reading it to him.

The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower court. The defendant did not demur to the plaintiff's replication upon the ground that a court of law could not try the issues it presented. These issues were tried to the jury without objection, and it is now too late to object for the first time in the appellate court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or *vice versa*, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. Hollins *v.* Brierfield Coal & Iron Company, 150 U. S., 371; Insley *v.* United States, 150 U. S., 512; Preteca *v.* Maxwell Land Grant Company, 50 Fed. Rep., 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler *v.* Savage, 143 U. S. 79; Reynes *v.* Dumont, 130 U. S. 354, 395. If a party when sued at law conceives that the action or any material issue in it is of equitable cognizance, he must interpose the objection at the threshold of the case and will not be heard to make it for the first time in the appellate court. The general principle is now well established that an appellate court will not entertain an objection to the form of the action when the objection was not interposed in apt time in the trial court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial court will be deemed waived. Elliott's Appellate Procedure, § 658, § 679, § 690, and citations; Brown *v.* Lawler, 21 Minn., 327; Brown *v.* Nagel, 21 Min., 415; Weaver *v.* Kentzley, 58 Iowa 191; Town of Mentz *v.* Cook, 108 N. Y. 504; Buffalo &c. Co. *v.* Delaware &c. Co. (N. Y.) 29 N. E. Rep. 121; Sexton *v.* Pike, 13 Ark. 193; Creely *v.* Bay State Company, 103 Mass. 514. In what is here said we are not to be understood as intimating that if the defendant had interposed a timely objection to the jurisdiction of the lower court to try the issues presented by the replication that the objection would have been of any avail. We express no opinion upon that question.

A further contention of the plaintiff in error is that there was not sufficient evidence to warrant the court in submitting to the jury the issue as to whether the release was procured from the plaintiff by fraud. The injuries to the plaintiff were of the most serious character and are permanent. He was unconscious for many hours after the accident, and when he recovered consciousness the pain from his injuries was so severe that he was compelled to take narcotics, which had their customary effect—while they deadened the sensibilities for the time being, they also deadened or dulled his senses. 98 This treatment continued for two weeks or more. Three or four days after the accident, while this treatment was going on, and while his arms were suspended over a rope stretched across his bed in order to relieve the pressure upon his injured spine, and when he was tortured and racked with physical pain (when not under the influence of opiates), the defendant's agents found their way into his sick-room, from which his friends and all others save his nurses had been excluded by order of his physician on account of the serious character of his injuries, and procured his signature to the release. There is evidence tending to prove the averments of the replication and to show that he did not and could not read the release and that it was not read to him and that he signed it relying upon the truth of the representations as to its contents made by the defendant's agents, which are set out in the replication and which need not be repeated. The issue as to whether the release was procured by fraud was therefore properly submitted to the jury, and upon the evidence in the record we cannot disturb their finding upon that issue.

It is next contended that there was not sufficient evidence to justify the court in submitting to the jury the issue as to the plaintiff's mental capacity to make a binding contract at the time he signed the release. The plaintiff in error is clearly estopped by the record from making this contention. After the defendant had introduced the release and rested, the record shows that the following proceedings took place:

"The plaintiff was then recalled in rebuttal. Plaintiff's counsel then made the following offer:

"'The plaintiff offers to prove by witnesses, Dr. Eskridge and Dr. Hughes, Dr. Kimball and Dr. Pershing that for the space of ten to fifteen days the plaintiff had not recovered from his injuries, and that his mind was weakened, and that he was unable from that source alone to do any business; that in connection with the shock, with the administration of opiates, in sufficient amount to cause unconsciousness, that at the time when defendant claims this agreement was signed his mind was not in a condition to fully understand or comprehend the terms and conditions of the agreement that was presented to him, and that, had it been read to him, or he had read it himself, he would not have been able to appreciate the force and effect of it.'

"Objected to. Objection sustained by the court, and Mr. Felker excepted.

"Mr. Felker: I offer to prove by Dr. Kimball that two weeks after the injury he called upon the plaintiff to examine him in regard to the extent of his injuries for the United States Accident Insurance Company; that he examined at that time the plaintiff and found him to be in a mental condition unfit to do any business or to comprehend and appreciate the force and effect of any business transaction that he might enter into.

99 "Mr. TELLER: I want to enter my objections, first on the ground that it would not be admissible anyhow under any circumstances, and—

"Second. It is specifically inadmissible on account of the state of the pleadings.

"The COURT: I will sustain it; I do not go upon that ground; I think these physicians have testified as fully as they can as to his condition. I do not care to hear anything more from them."

The witnesses were in court and ready to be called to the witness stand. The offered evidence was competent and material to the issue. It tended strongly to prove the plaintiff's case on the issue we are considering, and it was erroneously rejected by the court on the defendant's objection. The rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue and the court rejects it on the objection of the defendant, the defendant will not afterwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence. Bigelow on Estoppel (5th ed.) 720; Thompson *v.* McKay, 41 Cal. 221; Jobbens *v.* Gray, 34 Ill. App. 208, 218, 219; The Insurance Company of the State of Pennsylvania *v.* O'Connell, 34 Ill. App. 357, 362; Elliott's Appellate Procedure, § 630. The defendant will not be allowed to thus take advantage of his own wrong or the errors of the court induced on his own motion and then compel the plaintiff to suffer the consequences. Such a proceeding would be the merest trifling with the court. Jobbens *v.* Gray, *supra.* If the rule were otherwise it would encourage and reward unfounded and groundless objections to the plaintiff's evidence and tend to promote sharp practice and chicanery.

Upon the question of the sufficiency of the evidence to support the verdict on the several issues in the case, we may farther observe that the bill of exceptions does not show that it contains all the evidence. There is no statement in the bill to that effect. On the contrary it affirmatively appears that it does not contain all the evidence. The plaintiff in his testimony-in-chief examined several witnesses touching whose testimony the bill of exceptions states only that they "gave evidence tending to show," or "gave evidence tending to show substantially * * *." The opinion of counsel who drafted and of the judge who signed the bill of exceptions as to what the testimony of the witness "tended to show," or "tended to show substantially" cannot be accepted by the appellate court as the equivalent of the testimony of the witness. Gulf, Colorado & Santa Fé Railway Company *v.* Washington, 4 U. S. App. 121, 131; Railway Company *v.* Shelton, 57 Ark. 459. Such a mode of stating the evidence is proper enough when its only purpose is to show there was sufficient evidence upon which to predicate the instructions given or refused, but it is unavailing for the purpose of showing that the evidence was not sufficient to warrant the verdict of the jury.

100 The remaining assignments of error relate to the rulings of the court in admitting evidence. A separate statement and consideration of these exceptions is not necessary as none of them is of any general importance. They have all been considered carefully and we are satisfied none of them has any merit.

The judgment of the circuit court is affirmed.

Filed October 8, 1894.

101 *Judgment.*

And on the eighth day of October, A. D. 1894, in the record of the proceedings of said circuit court of appeals at the May term, A. D. 1894, thereof is an entry of the judgment in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ROBERT E. HARRIS, Defendant in Error.
} No. 439.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Robert E. Harris recover against the Union Pacific Railway Company the sum of twenty dollars for his cost herein and have execution therefor.

October 8, 1894.

Motion for Stay of Mandate.

And on the seventh day of December, A. D. 1894, a motion and affidavit of counsel for plaintiff in error for an order staying the issuance of the mandate herein was filed in said cause in the following words, to wit:

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Eighth Circuit.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
ROBERT E. HARRIS, Defendant in Error.
} Application for Stay of Mandate.

102 Now comes the said plaintiff in error and moves the court to withhold the mandate in this cause from the circuit court for the district of Colorado until such time as may be sufficient for the said plaintiff in error to obtain writ of error from the Supreme Court of the United States, application for said writ having been forwarded to Judge Brewer for allowance.

TELLER, ORAHOOD & MORGAN,
Attorneys for Plaintiff in Error.

T. W., 12, 5, '94.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Eighth Circuit.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ROBERT HARRIS, Defendant in Error.
} Affidavit.

Willard Teller, being first duly sworn, says he is one of the attorneys for the plaintiff in error in the above-entitled cause; that the said plaintiff in error herein is about to remove the same to the Supreme Court of the United States by writ of error to this court; that for such purpose he has already sent on to Judge Brewer at Washington the writ of error and citation to be allowed by him.

Affiant further says that he is informed by the clerk of this court that the mandate to the court below may issue as early as December 8th, and this affiant, being desirous that the mandate should not issue, has made a motion herein for the purpose of having said mandate stayed. Affiant further says that he expects the return of the said writ allowed by Justice Brewer within a few days; and further says not.

WILLARD TELLER.

Subscribed and sworn to before me this 5th day of December, A. D. 1894.

My commission expires January 12th, 1897.

CHARLES M. SPERRY,
Notary Public.

T. W., 12, 5, '94.

103 Endorsed: No. 439. United States circuit court of appeals. The Union Pacific Railway Company *vs.* Robert E. Harris. Application — pl'ff in error for stay of mandate and affidavit. Filed December 7, 1894. John D. Jordan, clerk. Teller, Orahood & Morgan, attorneys for pl'ff in error.

Order Staying Mandate.

And on the seventh day of December, A. D. 1894, an order of said circuit court of appeals staying the issuance of a mandate in said cause was filed in the following words, to wit:

The United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* ROBERT E. HARRIS, Defendant in Error.	No. 439. In Error to the Circuit Court of the United States for the District of Colorado.

Upon consideration of the application and affidavit of Mr. Willard Teller, of counsel for plaintiff in error, for an order staying the issuance of the mandate pending an application to the Supreme Court of the United States for a writ of error, it is now here ordered by this court that the mandate in said cause to be issued to the circuit court of the United States for the district of Colorado be, and the same is hereby, stayed for a period of thirty days from and after December 8th, 1894.

St. Louis, Mo., Dec. 7, 1894.

HENRY C. CALDWELL,
Judge U. S. Circuit Court of Appeals for the Eighth Circuit.

Endorsed: No. 439. Union Pacific Railway Co., plaintiff in error, *vs.* Robert E. Harris. Order staying mandate. Filed Dec. 7, 1894. John D. Jordan, clerk.

104 And on the third day of January, 1895, a bond on writ of error to the Supreme Court of the United States was filed in said cause in the following words, to wit:

Bond in Error or on Appeal, United States Court, Colorado.

THE UNITED STATES OF AMERICA,
District of Colorado.

Know all men by these presents that we, The Union Pacific Railway Company, Willard Teller, and Harper M. Orahood, of Denver, Colorado, are held and firmly bound unto Robert E. Harris in the full and just sum of five hundred dollars, to be paid to the said Robert E. Harris, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the May term, A. D. 1894, of the United States circuit court of appeals for the eighth judicial circuit, in a suit pending in said court between Robert E. Harris, plaintiff, and The Union Pacific Railway Company, defendant, — was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company having * obtained a writ of error to the Supreme Court of the United States, and a citation directed to the said Robert E. Harris, citing and admonishing him to be and appear in the United States Supreme Court, at Washington, D. C., at the October term, A. D. 1895:

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company shall prosecute said its suit to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE UNION PACIFIC RAILWAY CO., [SEAL.]
105 By WILLARD TELLER, *Its Att'y-in-fact.* [SEAL.]
WILLARD TELLER. [SEAL.]
HARPER M. ORAHOOD. [SEAL.]

December 28, 1894.
Approved as cost bond only.

DAVID J. BREWER, *Justice.*

Justification.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Willard Teller and Harper M. Orahood, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name—that is to say, as to Willard Teller, five thousand dollars; as to Harper M. Orahood, two thousand dollars over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

WILLARD TELLER.
HARPER M. ORAHOOD.

Subscribed and sworn to before me, at Denver, this twenty-fourth day of December, A. D. 1894.

CHARLES M. SPERRY,
[SEAL.] *Notary Public.*

Endorsed: Circuit court of the United States, district of Colorado. The Union Pacific Railway Company *vs.* Robert E. Harris. Bond on writ of error to Supreme Court U. S. $5,000. Filed Jan. 3, 1895. John D. Jordan, clerk.

And on the third day of January, 1895, an assignment of errors by the Union Pacific Railway Co. was filed in said cause in the following words, to wit:

106 *Assignment of Errors.*

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ROBERT E. HARRIS, Defendant in Error.
} Assignment of Errors.

Now comes the said plaintiff in error and says that in the record and proceedings in this case and in this court there is manifest error in this, to wit:

First. The court erred in affirming the judgment in this cause rendered by the circuit court of the United States for the district of Colorado.

Second. The court erred in holding and deciding that there was any contention on the part of the plaintiff in error that there was not sufficient evidence to warrant the court in submitting the question to the jury, such contention not having been made by the counsel.

Third. The court erred in holding that the plaintiff in error was contending before said court that there was not sufficient evidence to justify the circuit court of the United States for the district of Colorado in submitting to the jury the issue as to the plaintiff's mental capacity to make a binding contract at the time the release in this case was signed.

Fourth. The court erred in holding that the plaintiff in error was estopped from making a contention of that kind, if any had been made, by the record in that cause.

Fifth. The court erred in overruling and holding for naught assignments of error in the original record from the circuit court of the United States for the district of Colorado in respect to the admission of testimony against the objection of the plaintiff in error, such assignments in error being the 1st, 2nd, 3rd, 4th, 5th, and 6th, as set forth in the original record at page 85 of the printed record of this court.

107 Sixth. The court erred in sustaining the rule of the court below in overruling the motion of the defendant at the close of the testimony asking the court to hold that the release and facts shown in evidence was a complete bar to plaintiff's action, said error being assignment No. 7, on page 86 of the record of this court.

Seventh. The court erred in holding that there was no error in the circuit court of the United States in giving the instruction mentioned and assigned for error in assignment No. 9 of the printed record in this case, the instruction upon which error is assigned being in the words following: "But the court has some regard to the infirmities of men, and when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded."

Eighth. The court erred in holding that there was any error in the instruction of the court below, which instruction was set forth in assignment No. 10 of the record of this court, on page 96, and was in words and figures following, to wit:

"And upon that it becomes a question in the first instance whether he was in a condition to know precisely what he was doing. He seems to have had in some degree and to some extent the possession of his faculties; he had used whiskey at the time of the accident or shortly afterwards, and morphine had been administered to him on several occasions. There is a question as to the effect of the accident, how far he was disabled by it, and as to the effect of the drug and of the whiskey, perhaps, on his mind, whether he was then in a condition to deal with such a subject as was presented to him. If he was not, and you can say that his faculties were in such a state that he could not comprehend what he was doing and the force and effect of the paper which he signed, you may say he is not to be charged with it."

108 Ninth. The court erred in holding that there was no error in the circuit court of the United States for the district of Colorado in instructing the jury in the manner set forth in the eleventh assignment of error in this court, as follows, to wit:

"And aside from that, if there was a misunderstanding of the facts, whether the facts were wilfully misstated by the agent of the railway company or not is not a material question, but the question is whether the facts were understood by both parties. Upon that the agent of the railway company says that he only spoke in a general way of making a settlement. His language was such as to comprehend all matters that were in difference between them, while plaintiff says that he was not asked to consider, nor did he consider, the question of the liability of the railway company to him for the injury he had received, and that the mining company, to whom the car had been delivered and which was in some degree responsible for placing the car in a position in which it would come down upon the track and there throw the train, as it did in fact—that the mining company was liable to him for the injury and not the railway company."

Tenth. The court erred in holding that there was no error in the circuit court of the United States for the district of Colorado in instructing the jury, as set forth in the twelfth assignment of error in the record in this court, as follows, to wit:

"The plaintiff says that in reckoning up what should be paid to him they considered only the question in respect to his illness, his doctor's bill and the like, and the loss of time for two weeks. Now, if you accept this as the truth—that is to say, if you accept plaintiff's account of the negotiation between them as against that of the agent of the railway company—then it would appear that the plain-

tiff, at least, did not understand the subject-matter of the
109 negotiation, and as to what is expressed in the release he says
that he did not read it and could not read it without his spectacles, and that he did not have them at the time this (papers) was given him."

Eleventh. The court erred in holding that there was no error in the instructions of the circuit court of the United States for the district of Colorado, as set forth in the thirteenth and fourteenth assignments of error, on page 87 of the record of this court, as follows, to wit:

"As I have said to you before, under some circumstances a man in full health and accustomed to the transaction of business executing such a paper as that would not be at liberty to deny his knowledge of its contents, but with one in the situation of plaintiff, lying on his bed and somewhat prostrated by the shock which occurred at the time of the accident, he may be excused from reading if he did not in fact read it. I think that the agent of the railway company says that he did read it or that he appeared to him to read it. He is not willing to say that the plaintiff *his* his spectacles at that time. If I understood him correctly, he does not remember whether he had or had not his spectacles.

"What I have to say to you upon that point is that, if the plaintiff omitted to read, if he failed to read it under the circumstances disclosed, he may be excused because he was in some pain, misery, and, perhaps, to some extent, under the influence of morphine which he had taken."

Twelfth. The court erred in holding that there was no error in the circuit court of the United States in instructing the jury, as set forth in assignment No. 15 of the record of this court, commencing on page 87 thereof, as follows, to wit:

"And so this presents the matter whether the parties understood—that is, the plaintiff understood—at this time the facts on which, apparently, the agent of the railway company was proceeding in asking a settlement of the matter in issue between them, and
110 if the plaintiff understood it to be a settlement only for the
expenses of his illness and the time of two weeks which he would (possibl*e*) be confined to his bed or to the house and nothing more the paper will not be operative against him in respect to the damage which he may seek in an action of this kind."

Thirteenth. The court erred in holding that there was no error in the circuit court of the United States for the district of Colorado in instructing the jury, as set forth in assignment of errors No. 16, on page 88 of the record in this court, as follows, to wit:

"And also, if he understood that the company was not liable in this action, but that the mining company, to whom the car was consigned, was liable and not the railway company upon this point, for I do not think it necessary to say anything more to you upon it, it is for your consideration whether the plaintiff was in a state of mind and body to transact such business as this at the time it was done, and whether, if he was in such a state of mind and body that he might transact it in some fashion, the facts were understood by him—

that is to say, whether he knew that he was settling the entire controversy as it lay between himself and the railroad company in respect to the accident."

Fourteenth. The court erred in holding that there was no error in the circuit court of the United States for the district of Colorado in instructing the jury, as set forth in assignment of errors No. 17, on page 88 of the record of this court, as follows, to wit:

"But if you say that the paper ought not to be regarded as concluding him in respect to his right of action, we then come to the question whether there was negligence on the part of the railroad company through which the car was overturned to the hurt of the plaintiff; and upon that there is no room for controversy, notwithstanding the fact that this car was delivered to the mining company
filled with coal and for the use of the mining company, and
111 that it would seem from the evidence that after unloading
the car it was not sufficiently fastened in respect to the brakes.
Perhaps it was necessary to block the wheels also in such a place as that, but that, whatever was necessary to keep it securely in place upon the side track, was not done, and it moved down upon the track so as to overthrow the cars in the train which came down with the plaintiff. The act of the negligence of the servants of the mining company is to be ascribed to the defendant."

Fifteenth. The court erred in holding that the circuit court of the United States did not err in instructing the jury, as set forth in assignment of error No. 18, on page 88 of the record of this court, as follows, to wit:

"In other words, the railway company, as to its passengers, is bound to keep its track clear from obstructions of this kind; to see that the cars which it uses on side tracks are secured in place, so that they will not come upon the track to overthrow any train that may come along, and there seems to be no question but that the car in which plaintiff was overthrown by the freight car coming down from the switch or side track and on the main track in collision with the cars of the train which carried the plaintiff."

The said defendant therefore prays that the said judgment may be reversed.

WILLARD TELLER,
H. M. ORAHOOD,
E. B. MORGAN,
Attorneys for Plaintiff in Error.

J. M. THURSTON, *Of Counsel.*

T. W., 1, 2, '95.

Endorsed: In U. S. circuit court of appeals. The U. P. R'y Co., pl'ff in error, *vs.* Robert E. Harris, def't in error. Assignment of errors. Filed Jan. 3, 1895. John D. Jordan, clerk. Willard Teller, H. M. Orahood, E. B. Morgan, att'ys for pl'ffs in error.

112 And on the third day of January, 1895, a writ of error
from the Supreme Court of the United States to said circuit

court of appeals was filed in said cause, the original of which, with the clerk's return endorsed thereon, is hereto attached and herewith returned.

113 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Union Pacific Railway Company, plaintiff in error, and Robert E. Harris, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. —. Union Pacific Railway Co., plaintiff in error, *vs.* Robert E. Harris. Writ of error. Filed Jan. 3, 1895. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States from the United States circuit court of appeals for the eighth circuit a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this twelfth day of January, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

114 And on the third day of January, 1895, a citation to the defendant in error was filed in said cause, the original of which, with the return of service endorsed thereon, is hereto attached and herewith returned.

115 UNITED STATES OF AMERICA, *ss:*

To Robert E. Harris, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this twenty-eighth day of December, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Union Pacific Railway Co., plaintiff in error, *vs.* Robert E. Harris. Citation. Filed Jan. 3, 1895. John D. Jordan, clerk.

On this second day of January, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Clayton C. Dorsey before me, the subscriber, Charles M. Sperry, a notary public within and for the county of Arapahoe and State of Colorado, and makes oath that he delivered a true copy of the within citation to William L. Dayton, a member of the firm of Felker and Dayton, attorneys for the said Robert E. Harris, at Denver, Colorado, on the second day of January, A. D. 1895.

CLAYTON C. DORSEY.

Sworn to and subscribed the 2d day of January, A. D. 1895.
My commission expires January 12, 1897.

{ Seal Charles M. Sperry, Notary Public, Arapahoe County, Colorado. }

CHARLES M. SPERRY,
Notary Public.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the *following* pages, from 1 to —, inclusive, contain a full, true, and complete transcript of the record and all proceedings, including the opinion, of said circuit court of appeals in a certain cause wherein The Union Pacific Railway Company is plaintiff in error and Robert E. Harris defendant in error, No. 439, May term, A. D. 1894, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error and the original citation are hereto attached and herewith returned as a part of said transcript of record.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, this twelfth day of January, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,780. U. S. circuit court of appeals, eighth circuit. Term No., 896. The Union Pacific Railway Company, plaintiff in error, *vs.* Robert E. Harris. Filed January 29, 1895.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT E. HARRIS, DEFENDANT IN ERROR.

Motion & BRIEF OF DEFENDANT IN ERROR.

Clark & Reid, Printers, 1335 Lawrence Street, Denver.

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT E. HARRIS, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

This case comes up upon a motion to dismiss and affirm, under Subdivision 5 of Rule 6 of this Court.

The complaint of defendant in error (abstract, page 1) invokes jurisdiction upon the sole ground of diverse citizenship of the parties, in that The Union Pacific Railway Company is a corporation organized under the laws of the United States, "and having its principal place of business in the city of Omaha and State of Nebraska, and is * * * a citizen of the State of Nebraska."

The answer by its silence admits jurisdiction on that ground. The statute is explicit to the point that judgments of the Circuit Court of Appeals are final in all cases where jurisdiction is dependent upon the opposite parties being citizens of different States.

26 Stat. at L. Ch., 517, Sec. 6.
Lau Ow Bew vs. United States, 144 U. S., 47.
Am. Con. Co. vs. J. T. & K. W. Co., 148 U. S., 381.

The object of the statute was that this class of cases should not find their way into an overburdened Court. And this was one of the objects of the rule, added to that most just and salutary purpose, that this honorable Court, upon purely technical grounds, should not be made an asylum and hiding-place for judgment debtors when pursued by a just judgment.

It may be claimed that, the company being chartered under the laws of the United States, the writ will lie to this Court.

The case does not involve the validity or construction of its charter, and no Federal question arises. It is a case of damages for negligence of a corporation doing business in the State of Colorado, but having its principal place of business and citizenship in another State.

The plaintiff in error having in the lower Court conceded jurisdiction on the ground of diverse citizenship, it cannot or at least ought not to be permitted for the first time in this Court to base jurisdiction upon another and different ground. Such a claim would be extremely technical, should be of little weight, and receive no encouragement from this honorable Court.

The rule presupposes the existence of jurisdiction, for it provides for affirmance of the judgment where it is manifest that the writ or appeal was taken for delay only. No affirmance could be had without jurisdiction; and if there be color of ground for dismissal, the decisions of this Court are uniform that affirmance will follow, if it be manifest the writ was taken for delay only.

City of Chanute vs. Trader, 132 U. S., 210.

Northern Pac. R. Co. vs. Amato, 144 U. S., 465.

In the first case cited, the Court, speaking by Mr. Justice Blatchford, goes to the extent of saying that "This Court, in the exercise of its inherent power and duty to administer justice, ought, independently of Subdivision 5, Rule 6, to reach the mischief by affirming the action below."

In that case the Court clearly had jurisdiction, and under the rule the judgment was affirmed.

It will be observed in the latter case that the only jurisdictional fact alleged was "that the action arises under the Act of Congress" creating the corporation; and yet the judgment was affirmed under the rule. How much more, then, is there color for dismissal in the case at bar, when the only jurisdictional fact alleged is "diverse citizenship," although incidentally it be stated under what authority the corporation was chartered and organized, which statement was simply preliminary to the allegation of fact constituting jurisdiction. It certainly was the intention of the pleader to make citizenship the test of jurisdiction, as the allegation points directly to that as the ground relied on.

The cases are numerous in this Court where the motion to affirm, united with a motion to dismiss, has resulted in the affirmance of the judgment or decree, where the color of right to a dismissal was not nearly as strong as in the case at bar. We think that in all of the cases where it appeared that jurisdiction was claimed upon a technical right, and that the case was brought into this Court without any substantial purpose to be subserved, save for delay, this Court has almost universally applied this rule and granted the motion for affirmance.

MANIFEST DELAY.

The pleadings will be found in the abstract, pages 1 to 10, inclusive. Complaint was filed November 26, 1892. Answer, January 11, 1893. July 8, 1893, and six months after filing answer, an additional answer was filed. Replication, July 11, 1893. Trial was had July 14, 1893.

The last answer, filed six days before the trial, set up a written release in bar of the action, executed three or four days after the accident. The replication sets up three separate and distinct grounds of avoidance of the release, each one of which was sufficient of itself, under the law and evidence, to render the release void *ab initio.*

First—The mind of the contracting party, against whom the release is sought to be enforced, was so enfeebled by shock, pain and influence of opiates, that he was unfitted to enter into contractual relations.

Second—The minds of the parties never met on the principal subject embraced in the release—damages, for which this action was brought.

Third—The release was obtained through misrepresentation and fraud.

We cite a few of the many authorities to sustain these propositions:

C., R. I. and P. Ry. Co. vs. Lewis, 109 Ill., 120.
C., R. I. and P. Ry. Co. vs. Doyle, 18 Kan., 58.
Dixon vs. B. C. and N. R. R. Co., 100 N. Y., 170.
Magoric vs. Little, 25 Fed. Rep., 627.
Bean vs. W. N. C. R. Co., 12 S. E. Rep., 600.

The issues formed challenging this release are similar to those in the case of Bean vs. W. N. C. R. Co., *supra.*

The case was almost wholly tried upon the issues formed by the plea in bar and replication thereto; and the only errors assigned arise upon this branch of the case.

We desire to call the attention of the Court to two facts:

First—That in prosecuting its writ of error in the Court of Appeals and also in this Court, no supersedeas bond has been given. Defendant company being in the hands of a receiver, upon application of the second mortgage bond holders, no execution could be obtained pending decision upon these two writs of error.

Second—The bill of exceptions does not purport to contain all of the evidence. Therefore, no question can be raised as to the sufficiency of the evidence to support the verdict on any of the issues raised by the pleadings; and while the record discloses abundant testimony sustaining the verdict upon every proposition submitted to the jury, the settled practice of all Courts precludes a review of any question of fact in this case.

See opinion of Caldwell, J. (abstract, p. 98).

ASSIGNMENTS OF ERROR.

The disingenuousness of the second, third and fourth assignments of error (abstract, page 103) is plainly apparent. As a matter of fact, the "contention" spoken of by Caldwell, Justice, in his opinion, was made both in the printed and oral argument. To claim that the Court erred in assuming "contention" was made, and then predicating error upon the fact that "if made" the Court erred in applying the doctrine of estoppel, is playing shuttle-cock with integrity. But whatever might or might not have been the "contention" of counsel upon argument is of little consequence, for the judgment of the Court of Appeals is based on the law and facts of the case.

The fifth assignment goes to the admission of testimony. The assignments one to six, inclusive, of the original record, have been grouped in this assignment. One, three and four of this group were not raised in the Court of Appeals, and we had supposed them abandoned. Of number two, it need only be said that the answer of the witness to the question objected to rendered it entirely valueless (abstract, fol. 74), as he stated that his eyesight had failed. His testimony as to the condition of his eyesight at the time of signing the release was both competent and material. The jury, by this series of questions, were in nowise misled, and no prejudice could come to plaintiff in error. In no event was it grounds for reversal.

Lancaster vs. Collins, 115 U. S., 222.

Number five of this group falls under the same rule. The answer was not responsive to the question, and would, for that reason, have been stricken out had plaintiff in error so requested. The question was unobjectionable, as it elicited *extent of knowledge*, and not condition of mind or extent of rationality.

Number six of this group is even more frivolous than the other two. The testimony of the wife, who had lived with defendant in error for twenty-four years, showed her fitted to judge more correctly than another of the condition of her husband's mind; but if there was error, it was cured by cross examination upon the same subject (abstract, fols. 101–104).

The sixth assignment of error is without foundation in fact or law. The facts set up in the replication in avoidance of the release were, each and every of them, sustained by the evidence appearing in the record; and the bill of exceptions not containing all of the testimony, precludes plaintiff in error upon all questions of fact upon which the verdict is predicated.

INSTRUCTIONS.

The remaining errors assigned are simply reassignments complained of in the Court of Appeals, and arise upon instructions given.

The Court instructed the jury *sua sponte*, neither party requesting instructions, excepting one asked by plaintiff in error and refused, and upon which no assignment of error is taken.

It is well settled that instructions must be considered as a whole; and if they be a fair exposition of the law governing the case, they will not be disturbed. Appellate Courts do not permit losing parties to chop a charge of the Court into pieces, and then assign error upon each segregated piece, some one of which, standing alone, might contain some expression unwarranted in the law.

This rule is peculiarly applicable to this case, as the Court (abstract, page 79) requested counsel for plaintiff in error to call its attention to "any especial expression" or language used, if correction was desired. No correction was suggested and no fault found, except as to the general principles enunciated in the charge. The verdict being unsatisfactory, the eminent counsel proceeds with alacrity and skill to carve up the charge, with a view of exposing error by piece-meal. We submit that this is not only unfair to the trial Judge, but contrary to the well established practice.

There is not a single expression in the charge, when taken in connection with the whole thereof and construed as a whole, that is not a correct and fair statement of the law applicable to the facts in the case. It was plain—easily understood by the jury—and they could not be misled to the prejudice of the plaintiff in error.

The evidence showed and the jury must have found that plaintiff's body was racked with pain, his mind not recovered from shock, and that morphine sufficient to deaden pain had been administered, and in quantities sufficient to dull sensibility.

The undisputed fact was that Hussey, the irrepressible claim agent, with pencil and paper, figured up the cost and expenses of plaintiff's sickness and loss of time, and that it amounted to over $250; that he offered that as charity, and misrepresented both fact and law as to the company's liability. This in itself avoided the release. As said by Justice McLane, in Wheeler vs. Smith, 9 How., 55, "The agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract."

See, also—

Conner vs. Dundee Ch. W., 17 Atl., 975.

This is the general doctrine of the cases, and citations are unnecessary.

That defendant in error was ignorant of the contents of the release, is undoubted fact; that his failure to read it, under the circumstances, was excusable, is sustained by the authorities.

Lusted vs. C. and M. R. Co., 71 Wis., 391.
Schultz vs. C. and M. R. Co., 44 Wis., 638.
Butler vs. Regents of U., 32 Wis., 124.
Bean vs. W. N. C. R. Co., 12 S. E. Rep., 600.
Fist vs. Fist, 3 Colo. App., 273.

Incapacity to contract; failure to contract on the subject of damages; and fraud inducing the contract signed; all of which propositions of fact were embraced in, and supported by the general verdict, avoided the release.

There is not an assigned error in this case that rises to the dignity of serious consideration. The facts are so plain and palpable, there could be no misapplication of the law, and there was none. All of the testimony, even that of the indefatigable claim agent, Hussey, shows the defense to be an unconscionable one. The objections at the trial were technical; the assignments of error are frivolous; and every step taken since the coming in of the verdict of the jury has been taken for delay, pure and simple.

With the defendant in error dying by slow degrees, as the evidence shows he must from the very nature of his injuries, and before a decision in regular order could possibly be obtained; with a record showing a fair trial, fairly submitted to the jury, and with a reasonable, unprejudiced verdict; thoroughly briefed and exhaustively argued in the Court of Appeals, wherein judgment of the trial Court was sustained, appeals to every dictate of conscience and justice to cut short this palpable purpose of delay by enforcement of this salutary rule through affirmance of the judgment instanter.

G. G. VEST,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT E. HARRIS, DEFENDANT IN ERROR.

MOTION TO DISMISS, UNITED WITH A MOTION TO AFFIRM.

Comes now the defendant in error and moves this honorable Court to dismiss the writ of error in this cause, upon the grounds that—

This honorable Court is without jurisdiction either as to the parties to, or the subject matter of this action, in that the judgment of the Circuit Court of Appeals is final, for the reason that jurisdiction was dependent entirely upon the fact that the opposite parties to the suit were citizens of different States.

Defendant in error further moves this honorable Court to affirm the judgment of the United States Circuit Court of Appeals of the Eighth Circuit, rendered in this cause, on the grounds that, although the record may show that this Court has jurisdiction, it is manifest from the record that the writ was taken for delay only.

That the foregoing motions are united under Subdivision five (5) of Rule six (6) of the Rules of the Supreme Court of the United States.

G. G. VEST,
Attorney for Defendant in Error.

IN THE

Supreme Court of the [illegible]

OCTOBER TERM, [illegible]

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
ROBERT E. HARRIS.

No. [illegible]

In Error to the Circuit Court of Appeals of the [illegible] States for the Eighth Circuit.

Motion by Defendant in Error to [illegible] with a Motion to Affirm, under [illegible] graph 5 of Rule 6.

BRIEF FOR PLAINTIFF IN ERROR IN [illegible]

By Willard Teller,
Samuel Shellabarger, and
Jeremiah M. Wilson.

McGill & Wallace, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* ROBERT E. HARRIS.	No. 896.

IN ERROR TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE EIGHTH CIRCUIT.

Brief for Plaintiff in Error in Resistance of Motion to Dismiss, united with a Motion to Affirm.

The plaintiff in error, the Union Pacific Railway Company, presents the following statement in resistance of the motion to dismiss united with a motion to affirm, which is made by the defendant in error in the above-entitled case :

This motion to dismiss bases itself, in express words, upon the ground that "this court is without jurisdiction, either as to the parties or as to the subject-matter of this action, in that the judgment of the Circuit Court of Appeals is final for the reason that jurisdiction was dependent entirely upon the fact that the opposite parties to the suit were citizens of different States."

Assuming the fact to be as stated in what we here quote from the words of the motion, the motion is based upon the provisions of the sixth section of the act of Congress approved March 3, 1891, entitled "An act to establish Circuit Courts of Appeal, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes." (*26 Stats.*, *828.*)

This section 6, amongst other things, provides that the judgments or decrees of the Circuit Courts of Appeals "shall be final in all cases in which the jurisdiction is dependent *entirely* upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States."

It will be seen by reference to the Record in this case (p. 1, folio 2,) that the complaint, by the defendant in error, expressly states (what, however, the court takes judicial notice of,) that the plaintiff in error, the defendant below, "was heretofore, and now is, duly chartered and organized under and by virtue of the laws of the United States." Thus the court is made to know by the Record, and also by its judicial notice of the laws of Congress, that the defendant below, the plaintiff in error here, is a corporation created by and operating under certain acts of Congress, to wit, the act of July 1, 1862 (*12 Stats.*, *489*), the act of July 2, 1864 (*13 Stats.*, *356*), and the various acts amendatory thereof.

This being the state of the matter, it becomes at once evident and incontrovertible that the judgment of the Circuit Court of Appeals in this case of the 8th of October, 1894 (*R.*, *p. 99*), affirming the judgment of the Circuit Court, is not a "final" judgment, within the sense of the word "final" in section 6 of act of March 3, 1891 (*26 Stats.*, *828*), because the jurisdiction of the Circuit Court and the Circuit Court of Appeals is not dependent "entirely" upon the opposite parties to the suit or controversy, being citizens of different States as provided in said section 6.

On the contrary, this case, as appears by the Record, is one as to which the jurisdiction of the Circuit Court and the Circuit Court of Appeals is given by the provisions of the act of March 3, 1875 (*18 Stats.*, *470*), and the acts amendatory thereof, which give to the Circuit Courts of the United States "original cognizance, concurrent with the several States, of all suits of a civil nature, at law or in equity * * * arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

Since it has been, by this court, repeatedly and uniformly held that corporations of the United States, created by and organized under acts of Congress, are entitled, under said act of March 3, 1875, to remove into the Circuit Courts suits brought against them in State courts on the ground that such suits are suits arising under the laws of the United States, and since the Union Pacific Railway Company is, as to its road, property and franchise, a corporation created and organized under and by virtue of acts of Congress, and derives all its corporate and other powers therefrom, therefore the said company is a corporation, according to the adjudications of this court, coming strictly and literally within the provisions of section 1 of said act of March 3, 1875, giving to the Circuit Courts of the United States "original cognizance of all suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States."

It is thus apparent that the present suit is not one where the jurisdiction of the Circuit Court of the United States is "dependent entirely" upon the opposite parties to the suit being citizens of different States, and, therefore, not one as to which the judgment of the Circuit Court of Appeals is by law made final. On the contrary, it is one coming within the last clause of section 6 of said act of March 3, 1891 (*26 Stats., 828*), which provides as follows:

> "In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

The cases in this and other United States Courts which hold, as above stated, that corporations of the United States created by and organized under acts of Congress are entitled, under the act of March 3, 1875, to remove to the Circuit Courts of the United States suits brought against them in State courts, are literally innumerable and uniforn.

Take, for example, the case of *Texas Facific Railway Company* v. *Kirk* (115 U. S., 1), and the numerous cases going to that point which are cited in the opinion of Justice Bradley in that case; or

Take the case of *Strain* v. *New York* (115 U. S., 240), and the numerous cases cited on page 257, all to the same effect; or

Take the case of *Bank* v. *Cooper* (120 U. S., 778, 780), and cases cited deciding the same thing; or

Take the case of *Mitchell* v. *Smale* (140 U. S., 406), and cases cited to the same effect; or

Take the case of *Northern Pacific Railroad* v. *Amato* (144 U. S., 465, 471), cited in the brief of the defendant in error in support of his motion to dismiss and affirm. That case is one which precisely and conclusively decides the present question as to the jurisdiction of this court. What it holds in this regard is thus expressed in the first and second paragraphs of the syllabus:

"A suit was brought in the Supreme Court of New York against a railroad corporation created by an act of

Congress, to recover damages for personal injuries sustained by the plaintiff, who was a laborer on the road, from the negligence of the defendant. The suit was removed by the defendant into a Circuit Court of the United States on the ground that it arose under the act of Congress. It was tried before a jury, and resulted in a verdict and judgment for the plaintiff for $4,000. The defendant took a writ of error from the Circuit Court of Appeals, which affirmed the judgment. On a writ of error taken by the defendant from this court to the Circuit Court of Appeals, a motion was made by the plaintiff to dismiss or affirm : *Held*—

"(1) Under sec. 6 of the act of March 3, 1891, c. 517, 26 Stat., 826, the writ would lie because the jurisdiction of the Circuit Court was not dependent entirely on the fact that the opposite parties to the suit were one of them an alien and the other a citizen of the United States, or one of them a citizen of one State and the other a citizen of a different State, but was dependent on the fact that the corporation being created by an act of Congress, the suit arose under a law of the United States without reference to the citizenship of the plaintiff.

"(2) The decision of the Circuit Court of Appeals was not final, nor in effect made final, by the act of 1891, as in *Lau Ow Bew* v. *United States*, 144 U. S., 47."

The same thing is in the opinion of the court at pages 471 and 472.

This case is, therefore, so far as the matter of the jurisdiction of this court is concerned, one which decides directly, explicitly, and unmistakably, the objection to the jurisdiction to be without merit and frivolous.

The suggestion on page 1 of the brief of the defendant in error in support of his motion, which says that the answer, by its silence, admits jurisdiction on the ground of diverse citizenship, we suppose to be intended to say that the silence of the answer admits that the plaintiff in error rested its claim that this court has jurisdiction entirely upon the ground of diverse citizen-affirm ought not to be entertained—this because a line of decisions extending throughout nearly the whole history of this court, and which are uniform, has thoroughly established the proposition laid down by Chief Justice Marshall (here adopting the words of this court in the *Pacific Railroad Removal Cases*, 115 U. S., p. 11; in the case of *Osborne* v. *Bank*, 9 Wheat, 738, 817, 828), "delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States," and, therefore, a suit coming within the jurisdiction created by the 1st section of the said act of March 3, 1875. (*18 Stats.*, *470*.)

But let it be assumed that this motion to affirm can be made and sustained in the absence of all color of want of jurisdiction of this court, and then we may briefly state the grounds upon which we maintain that it is absolutely impossible fairly to assert that this appeal "is manifestly taken for delay," or is frivolous, or the grounds thereof frivolous.

Since, by the express words of paragraph 5 of Rule 6, and also by the uniform holdings of this court, motions to affirm, united with motions to dismiss, can never be granted unless "it is manifest the writ or appeal was taken for delay only," therefore, in briefs in resistance of such motions it is not required of counsel opposed to the motion that they shall do more than point out that in the Record which satisfies the court that the writ of error is not taken for delay only or is not frivolous. (See 132 U. S., 210; 105 U. S., 267; *Id.*, 3; 132 U. S., 524.)

In other words, it is not, by the practice of this court, imperative upon counsel that they shall make the brief, required by this Rule 6 in resistance of the motion to dismiss and affirm, so full and complete as is appropriate and required where the brief asks a reversal of the judgment below.

To require such degree of fullness of investigation by counsel, and also such fullness on the part of the court, is to impose upon counsel and the court two full trials of the case on the downright merits thereof, in the event that the motion to dismiss and affirm is not sustained.

Hence, whilst it is our opinion that the errors and irregularities which we here point out, going to show that the appeal was not taken for delay merely, do amount to a showing that the judgment ought to be reversed, yet we shall not here attempt that degree of fullness of investigation and statement which we would deem requisite if this were a brief filed on the final trial of the case.

This statement regarding the non-requirement of that full investigation in briefs resisting motions to dismiss and affirm which is due in briefs on the final trial, is in accord with the constant practice of this court as expressed in such cases as *Railway Co.* v. *Kirk*, 111 U. S., 487; *Iron Co.* v. *Hoagland*, 108 U. S., 5; *Mayor* v. *Walsh*, 108 U. S., 17.

We now turn to a statement of some of the errors relied on in the courts below, and on which we here rely in resisting the motion to dismiss and affirm.

The plaintiff below, Robert E. Harris, was recalled in rebuttal, and examined a second time on the 14th of July, 1893 (*R., p 47*), within half a month of a year after the time of signing the release on the 4th of August, 1892. At page 50 he was asked:

> "Q. Now, can you read any portion of that at the present time without spectacles (handing release to witness)?"

This was objected to by counsel for the defendant because incompetent, but the court overruled the objection, and exceptions were taken. This action of the court was assigned as one of the grounds of error (*R., p. 85*), and reassigned in the Circuit Court of Appeals in the fifth assignment of error. (*R., p. 103.*) Assignments three and four (*R., p. 85,*) are, in substance, the same as this assignment No. 2, and the three may be disposed of together.

The point of these exceptions is that the condition of the eyesight of the defendant in error nearly a year after he signed the release is too remote in point of time from the signing of the release to be admissible as throwing reliable light upon his ability to read at the time of executing the release.

The principle upon which this evidence is excluded is stated in section 52 of 1 Greenleaf on Evidence. Speaking of the rule that evidence must tend to prove the issue, the author says:

> "This rule excludes *all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute*, and the reason is that such evidence tends to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead them."

Connected with this is the further principle that in point of time this collateral fact is too remote from the principal one to throw any material reliable light on the question whether the defendant in error could read on the 4th of August, 1892, the date of the execution by him of the release above mentioned.

We submit that on this most familiar rule of evidence the exceptions set forth in assignments 2, 3, and 4 were well taken, and that there was manifest error in overruling them. That they were calculated to "draw away the minds of the jurors from the point in issue" is exceedingly plain. Anything that has that effect must be rejected as tending to mislead the jury.

On this subject, in the case of *Vicksburg & Meridian Railroad Co.* v. *O'Brien* (119 U. S., 103), this court held:

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not, and could not, have prejudiced the rights of the party."

Citing—

Smiths v. *Shoemaker*, 17 Wall., 630, 639;
Deery v. *Gray*, 5 Wall., 795;
Moores v. *National Bank*, 104 U. S., 625, 630;
Gilman v. *Higley*, 110 U. S., 50.

In the above-cited case of *Gilman* v. *Higley* (110 U. S., 50), speaking of the contention that because the Record did not show all the evidence, a misleading question was, therefore, not a ground for reversal, the court says:

> "We have not before heard of such a rule in a revisory court. The farthest any court has gone has been to hold that when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded. This court, in *Deery* v. *Gray*, 5 Wall., 807, used this language: 'Wherever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.'"

In the light of these authorities, therefore, we insist that there was error in overruling the objections raised by assignments 2, 3, and 4 (*R., p. 85*), and repeated in the Circuit Court of Appeals in assignment No. 5. (*R., p. 103.*)

This position is strengthened by the fact that the plaintiff himself declared (*R., bot. p. 50,*) that his eyesight was not as good at the time he testified as it was at the time of signing the release. He says: "I think it has failed." And it is still further strengthened by what he says at the top of page 50, to wit: "I took it (the release) in my hand and looked at it; could not read it; my hands was shaking so that I can't even read it now. I was worse then than I am now."

This is a confession that the reason he was not able to read the release was because of the shaking of his hands, and not because of any defect in his vision. The shaking of the paper by reason of the shaking of his hands could have been easily prevented by laying it on a table or other rest.

The fifth assignment of error (*R., p. 85,*) presents the question whether a man shall be allowed to swear to his own unconsciousness at a given time. The question asked was:

> "Were you, at the time of signing the release, conscious that you were signing any agreement other than for your expenses?"

By the use of the word "conscious" in this connection the jury had a right to suppose, and doubtless did suppose, that he was not testifying as to the fact of his being merely *mistaken* as to the contents of the release; but that the word "conscious" had regard to his mental condition, or whether he was in possession of his ordinary faculties, or of the power of knowing his own thoughts.

To ask a witness such a question and allow him to make an answer swearing to his absolute want of consciousness or of ability to execute the paper, in view of all the particulars that appear in his evidence from page 47 of the Record to the end of his testimony at page 60, and in which it will be seen that he is enabled to testify fully and in detail to the transactions that occurred at the time of signing the release, is virtually to allow a most ruinous and misleading question to be asked and answered. If the counsel did not mean to ask whether the witness was in a conscious condition *mentally*, but meant simply to ask whether he was laboring under a *mistake* as to the character or extent of the release, then the question should have been modified or excluded under the rule which we have just cited from the case of *Gilman* v. *Higley* (*supra*).

The seventh error (*R., p. 86,*) is that the court erred in overruling a motion of the defendant, at the close of the testimony, asking the court to hold that the release and facts shown in evidence were a complete bar to plaintiff's action.

In regard to this assignment, we take from the brief of Messrs. Teller, Orahood, and Morgan, counsel for defendant in the court below, the following:

First—The release in terms expressly, and by a definite statement, referred to the plaintiff's claim, upon which he brought suit, as well as other claims and demands whatsoever. It recited a consideration of $250, and it was admitted that that amount was paid to plaintiff.

Second—Such a release by all the authorities is of the highest significance, and its execution being admitted or proven, and no fraud, actual or constructive, having been shown in proving its execution, it is a complete bar to an action on account of anything that, by its terms, is included in it.

Third—The fraud that entitles a court to set aside or annul such an instrument, or any instrument founded on a good consideration, is "fraud, whereby a person is induced by deceit to make it, and this fraud or covin must relate to the *obtaining of the instrument itself*, and not to the quality, quantity, value or character of the consideration."

Oregon v. *Jennings*, 119 U. S., 74–89.

In *George* v. *Tate*, (102 U. S., 571), the court says:

"It is well settled that the only fraud permissible to be proved *at law* in this case is fraud touching the execution of the instrument, such as misleading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give."

Hartshorn v. *Day*, 19 How., 211–222.

Vandevelden v. *C. & N. W. R. R.*, 61 F. R., 64–56.

In *Conly* v. *Nailor* (118 U. S., 127–134), it is held, to enable a court at law to annul an instrument, it must be shown that the party in making it "had *no free will, but was in vinculus.*"

Fourth—There was no evidence of any kind from anybody of any fraud in procuring the signature to the release. Every witness who was near him at the time the release was presented—Wood (fol. 47), Harris (fols. 72, 83, 84), Mrs. Harris (fol. 98), Mrs. Sherwood (fol. 91)—not only failed to show any representations of any kind were made, but all of them told all they could remember of what was said at the time, but the plaintiff himself says that what was said on presentation was: "Here is the agreement. Are you willing yet to fix the expense account (fol. 83)? I have got it all fixed up now, and here it is." It is clear, then, that there was no fraud in the matter of procuring his signature to the release.

Fifth—It only remains, then, to inquire whether the defense set up, upon which the release was sought to be cancelled, was sufficient, if proven, to cancel it, and was such defense, by way of reply, sustained by the evidence? All and everything contained in the reply may be summed up as follows:

1. (Fol. 11 *et seq.*) That at time of the execution of the release, plaintiff, by reason of the shock, etc., was so dazed that he was incapable of doing business.

2. That claim agent forced himself into plaintiff's presence against the express order of Doctor Hughes, knowing plaintiff was too sick to attend to business.

3. That the agent falsely represented that the Silver Age Company was, and the defendant was not liable.

4. That agent told plaintiff that Doctor Hughes said he would be out in two weeks as well as ever.

5. That plaintiff did not, and could not, read the release, and did not know the contents.

6. That the release was obtained by an unfair advantage, and that plaintiff was induced to sign it under a misapprehension of its contents.

We have already referred to the fact there is in this record not a particle of evidence to support the first or second points. On the contrary, all the evidence shows plaintiff was wide awake and alert, and nobody said a word in the case about improper conduct of claim agent in going to plaintiff's room. On the third point, the evidence shows the agent did say that the Silver Age Company was liable and the railroad company was not, but nobody will claim that such a statement of an opinion on a question of law as to liability of the several companies can be regarded as a fraud. Nor was it untrue that the Silver Age Company was liable. That the railway company may also be liable, does not affect the liability of the milling company. On the fourth point, Doctor Hughes himself says (fol. 28), that both he and Doctor Lyman did say that they thought defendant would recover in about two weeks, and Hussey, the agent, (fol. 33), says: "I told him that in my talk with Doctor Lyman he had given me his opinion that he probably would be able to be up and around in a couple of weeks." There was, then, no false statement about the time the doctor said he would probably recover and get about. All this shows that there was no unfair advantage taken, plaintiff was not thus induced to sign it, and the only other alleged defense to the release was that plaintiff did not read it and was unable to read it on account of his sickness. We have already noticed the fact, that so far as his mental condition at that time is shown by his own testimony, there can be no question but that he could have read and fully understood the instrument; he himself swears that he could not read it because his hands shook so, yet he did, despite that fact, manage to hold the release and the check still enough to write his name, and to write it in good form, holding it, as he says, on a *book*, while Wood, the man who presented it, says he did read it and asked questions about the distribution figures on it (fols. 48 and 51). On the question, then, whether he did or did not read the release, there were but two witnesses, the one a disinterested witness who says he did read, the other the plaintiff, having an interest, who says he did not. Now, as the burden was plainly on him to show he did not, if that fact be deemed material, it is beyond all question that the alleged fact that he did not read the release before executing it is, for the purposes of this adjudication, totally unproved, and, therefore, the case must be disposed of on the assumption that he read and knew the contents of the release, and did not sign it under the influence of any deception or fraud practiced by the defendant below—that he signed it with adequate comprehension of its contents, and with full knowledge of the effect of his act in so executing it.

In regard to the alleged fact that the defendant in error could not read without his spectacles, and, in fact, did not read the release before signing it, there being no trick, deception, or fraud practiced upon him to induce him to execute it, or to omit to read it, and no physical disability to prevent his reading it, it is a complete answer to this part of the Record to say that each party to the instrument, is entitled to the protection the instrument affords it, and is not to be deprived of it by either the willful or neglectful omission of a party to read it.

Grace v. *Adams*, 100 Mass., 507.
Rice v. *Dwight Mfg. Co.*, 2 Cush., 80–87;
Lewis v. *G. W. R. R.*, 5 H. & N., 867;
Belger v. *Dinsmore*, 51 N. Y., 173;

The case of *Mateer* v. *Mo. Pac. R. R.* (105 Mo., 320–352–3), is a case very much in point. The release was handed to the party and he was told to sign it; he could read, and the court says:

"It was his duty to read it before signing it, and he will not now be heard to say that he did not, when every opportunity was afforded him to do so. To permit such a rule would unsettle the business affairs of the country." The court also says: "The law favors the compromise and settlement of disputed claims. It is to the interest of the commonwealth that there should be an end of litigation. If these settlements finally made and entered into are to be disturbed on frivolous grounds, it will often deter these companies from doing justice to their employés who have received injuries, for fear of future litigation."

In *Hazard* v. *Griswold* (21 Fed. Rep., 180), Justice Gray, of the Supreme Court, says:

"A person capable of reading and understanding an instrument which he signs is *bound in law to know the contents thereof, unless prevented by some fraudulent device, such as the substitution of one instrument for another.*"

In that case, as in this, the plea was that false representations were made as to what the instrument contained, and the court said:

"This plea does not aver any fact in excuse or to justify the defendant in relying upon the representations alleged to have been made on behalf of the plaintiffs."

In *Seebright* v. *Fletcher* (6 Blackf., 381), the court says:

"But it appears that he signed the bond without reading it himself or having it read, and with all the means of knowing the truth in his power, reposed a blind confidence in representations not calculated to deceive a man of ordinary prudence and circumspection. *In such a case the law affords no relief.*"

In *Taylor* v. *Fleckenstein* (30 Fed. R., 99–100), the syllabus of the case, as given by the court, is as follows:

"It is no defense to an action on a writing that the defendant was misled or misinformed as to the contents and effect of the same, unless it also appears that, by reason of some disability, he was *incapable* of reading and comprehending the writing for himself, or that he was imposed on by some fraudulent device, as the substitution of one writing for another."

The case of *Wallace* v. *Chicago, etc., R. R. Co.* (67 Iowa, 547), is a case in some respects very similar to the case at bar, but much stronger, because in that case the plaintiff claimed that when the release was presented to him the agent told him it was only a voucher for back pay, and, having signed without reading, the court says that, despite that fact, the court ought to have instructed the jury—

"That if you find that plaintiff had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but that having full opportunity to read it before signing, he chose to rely upon what Mr. Flint (the agent) said about it, he is estopped from claiming that the same is not legal and binding upon him according to its terms."

In case at bar it must be remembered there is no claim by plaintiff that anybody undertook to tell or did tell him what the instrument was for or what it contained, at time it was presented to him.

To the same effect are the following cases:

Gulliher v. *C., R. I. & P. R.*, 59 Iowa, 416–422;
McCormack v. *Molbery*, 43 Iowa, 561;
Squires v. *Inhabitants, etc.*, 145 Mass., 192;

In which last case the facts are very similar to those in this case:

Snider v. *The Adams Ex. Co.*, 63 Mo., 383.

In *Greenfield's Estate* (14 Pa. St., 496), the Supreme Court of Pennsylvania says:

"If a party who can read, will not, a deed put before him for execution; or, if being unable to read, will not demand to have it read or explained to him, he is guilty of supreme negligence, which, I take it, is not the subject of *protection either in equity or at law. At law it certainly is not.*"

And this language is quoted as the authority for the same doctrine held by the same court in *Pa. R. R.* v. *Shay* (82 Pa. St., 198–202), and that, too, in a case where the party signing claimed that it was represented to him by the agent that he was signing for funeral expenses only, and the defense was only entertained and the evidence admitted on the ground that if plaintiff was induced to sign it through a *false* representation by the agent, and believed it was only for funeral expenses, it was competent for him to show that the release was thus procured in fraud of his right. In this there was talk about the funeral expenses, and plaintiff swore he thought it covered only those expenses, yet the court reversed the verdict of the jury on the sole ground that there was no fraud, even if plaintiff's story was true, and that he was bound to know what he signed.

Nor can there be found the decisions of any respectable courts that hold otherwise from those above referred to, though there are two cases, in Illinois, to wit, *Welch* v. *Ill. C. R. R.* (52 Ill., 183–187), and *Lewis* v. *C., R. I. & P. R. R.* (109 Ill., 120), which at first seem to hold so, but we submit neither of those cases, when the facts are considered, are authorities that are in conflict with our contention. In the first case, the decision was not solely on that point, and in the second case the evidence of the condition of the woman was such that the court says: "It may be safely said she was in *no condition* to consider with *any degree* of *deliberation* a matter so grave as that submitted to her."

Lastly, by all the authorities a release of this kind is to be treated as any other written instrument, all negotiations leading up to the release are presumed to be merged in the instrument, and it becomes the only competent evidence of the agreement of the parties, and can be avoided only for fraud, mutual mistake or duress, and it can not be limited or qualified by parol proof.

In Parsons on Contracts, page 715, it is said:

"When the release is general, it cannot be limited or qualified by extrinsic evidence, although a receipt may be. And a release or receipt in full throws the whole burden of proof on him who signed it, if he alleges that he signed it through mistake or fraud."

Pierson v. *Hooker*, 3 Johns., 68;
Kirchner v. *N. H. S. M. Co.*, 135 N. Y., 182–188.

In *Rose* v. *Railway Company*, (12 Atl. R., 78), the Supreme Court of Pennsylvania say that the charge of a judge to the jury—

> "That the release was not to be set aside upon any but the strongest and clearest testimony, and that to infer fraud from anything but the most satisfactory proof is to infer a criminal thought or disposition which is against the presumption of law"—Was "obviously correct."

To the same effect—

Company v. *Silva*, 125 U. S. 247.
Peterson v. *Seattle*, 33 Pac. R., 351.
Doty v. *St. Paul & K. Ry. Co.*, 52 N. W. R., 135.
Hawes v. *B. & C. R. R. Co.*, 64 Iowa, 319.

Now, this being the rule of law, the court was bound to find, as a matter of law, that the release had not been in any manner impeached by any evidence given, and the instruction asked by defendant was clearly the law of the case and should have been given. The release was both special and general, but the special portion, typewritten, shows that it was a settlement in full of the claim on account of injuries received on the day and at the place named, and hence it was a complete bar to plaintiff's action.

The ninth assignment (*R., p. 86,*) is that the court erred in this, that, after having stated to the jury correctly the rule of law applicable to the facts in the case, it added :

> "But the court has some regard to the infirmities of men, and when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind, that makes it probable that he acted without deliberation, without an understanding of the act, with which he is charged, the instrument itself may be disregarded."

The error of this added statement is made palpable by the authorities and considerations gone over in support of the seventh assignment.

As to this, we say, it is not the law, and has, heretofore, never been held to be the law, that a release duly signed and upon a good consideration, as in this case, can be set aside either by court or jury, when it simply appears *probable* that the party signing it acted without deliberation and without an understanding of the act of signing. We have already called attention to the kind of proof necessary to set aside such an instrument; it is not the *probability* but the certainty that he did not act knowingly. But, more than that, it must be shown that his failure to deliberate and understand was not his own negligence, in failing to see and understand when he could have done both. The rule is, that the party will be held to his act and presumed to have understood what he was doing, until, by the most satisfactory proof, it is shown that either because of his incapacity to understand, or because of some trick or fraud which misled or overcome his intelligence, he was induced to sign it. This instruction is clearly in the *face of every text book*, and every authority on the subject of fraud in the execution of written instruments, and, if followed, would lead to unsettling half the business contracts of the business world.

Fraud is never presumed, but is always to be proved. A probability is nothing but a presumption, and if the charge herein is correct, the proof required to overthrow the presumption that arises from a party's signature is a mere *probability*, or another presumption that he did not know what he was doing. We certainly need not cite further authorities on this point.

The tenth assignment of error is set forth on page 86 of the Record. The point of the instruction set forth therein is to submit to the jury as a question of fact, under all the testimony, whether, at the signing of the release, "the faculties of the defendant in error were in such a state that he could comprehend what he was doing, and the force and effect of the paper signed." The court instructs the jury that if he were not, then he is not to be charged with the release.

Without here quoting the words of the testimony, we refer the court to folios 72, 83, 84, 88, 89, &c., of the Record, in regard to the question whether there was any evidence tending to show that, at the time the release was signed the defendant in error could not comprehend what he was doing and the force and effect of the paper signed. In view of this testimony, and of all parts of the Record, we assert that there was *not the slightest* ground for instructing the jury that they might find that when the release was signed the defendant in in error *could not* comprehend its language and effect.

Instructions nine and ten, as to the point we make regarding them, are substantially the same. They are misleading, for the reason that they "call away" the minds of the jurors from the only real question made by this part of Record, to wit, the question whether the acts, representations, &c., of the agents of the plaintiff in error, *along with* the mental weakness or incapacity of the defendant in error, were such, taken together, as to avoid the release. The instructions given were such as to lead the jury to think that the court was of opinion that there was evidence in the Record sufficient to justify a finding that the plaintiff below was *mentally incapable* of making a valid contract.

In regard to this tenth assignment, as of the ninth, we submit that the instruction regarding the capacity of the plaintiff below to comprehend the paper which he signed is a *distinct and independent* question from the one as to whether he was in such a state of mind that the statements, representations, and methods employed to induce him to sign were misleading and deceptive, and may have misled his *impaired* faculties. This assignment is one which leaves to the jury the question of his *capacity* to comprehend his act, *independently* of acts tending to mislead an impaired or weak mind.

As to this last question, considered apart from the alleged false representations, &c., there was not a *scintilla* of evidence, not even that of the plaintiff himself, or of his wife, going to show that he had not the mental capacity to understand the release at the time he signed it, or which brings his incapacity within the class alluded to in these ninth and tenth instructions, to wit, the class where the party's faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed. This instruction, then, as to his ability to comprehend the paper was an *abstract* instruction based upon no evidence, and one that assumes that there was evidence of incapacity which would justify the jury in looking into that *distinct* question, divested of all questions, of misrepresentations, &c.

So to assume, in a charge to a jury, a fact which is not justified by the Record is error.

Insurance Co. v. *Foley*, 105 U. S., 350–3;
Insurance Co. v. *Baker*, 94 U. S., 612, 613;
Bank v. *Hunt*, 11 Wall., 391;
Railroad Co. v. *Gladmon*, 15 Wall., 401.

The action of the court in thus submitting to the jury, by itself and independently, the question whether the mind of the defendant in error, at the time of the execution of the release, was such that "*he could not comprehend its purport*," there being not a particle of evidence upon which to base such a theory, was clearly erroneous. Among the innumerable cases which so hold is the case of *Davis* v. *Patrick* (122 U. S., 138, 153–4). There the court, speaking of an instruction in regard to a theory which was unsupported by evidence, says:

"The last instruction quoted was, therefore, based upon an erroneous theory, unsupported by evidence, and the jury may have rendered its verdict upon this erroneous theory, ignoring the view that the defendant was the company. This second erroneous instruction may, therefore, have misled the jury to the defendant's injury. For these errors the judgment is reversed."

The last paragraph of the head-note on this point is:

"An instruction to a jury based upon a theory unsupported by evidence, and upon which theory the jury may have rendered its verdict, is erroneous."

This, like most of the other legal questions raised by this Record, is very familiar law, and needs no citation of authority.

The decisions of this court have abundantly settled the question of law as to what is that *degree* of mental incapacity which, *considered by itself and apart from fraudulent practices resorted to to induce the execution of the contract*, releases a party from obligation.

In the case of *Johnson* v. *Harmon* (94 U. S., 379), decided in 1876, the court says:

"Imbecility of mind is *not of itself* sufficient to set aside a contract when there is not an *essential* privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life. Weakness of understanding may be a material circumstance in every case where the charge is that one of the contracting parties has taken undue advantage of the other, or has been guilty of unfair practice or imposition."

In the case of *Conley* v. *Nailor* (118 U. S., 133), this court very justly remarks as follows:

"The cases of *Harding* v. *Handy* (11 Wheat., 103), and *Allore* v. *Jewell* (94 U. S., 506), are cited by the plaintiff's counsel as authorities in law against this conclusion. These cases establish the proposition that extreme weakness of intellect, even when not amounting to insanity, in the person executing a conveyance, may be sufficient ground for setting it aside *when made upon a nominal or grossly inadequate consideration.* Conceding the correctness of this legal proposition, it can have no application to the present case unless the facts are substantially the same. A cursory reading of the cases will show such a palpable *difference* in the facts as to make it clear that they can not be taken as controlling authority in this. Cases like the present must each stand upon its *own facts*, and when the testimony shows that the grantor was sober and capable, *and well knew what he was doing when he executed the deed*, no other case materially differing in its facts can furnish a reason for setting aside the deed thus executed."

The result of all the cases is fairly stated in the fourth paragraph of the syllabus, as follows:

"In order to cause a will or deed to be set aside on the ground of fraud and undue influence, it must be established to the satisfaction of the court that the party making it *had no free will*, *but stood in vinculis.*"

Surely, in view of these cases, it can not be successfully denied that these assignments 9 and 10 do present a case where these instructions to the jury were misleading, and, therefore, erroneous—misleading because it assumes, what nothing in the Record even *tends* to show, that the defendant in error, at the time of signing said release, was without mental capacity to comprehend the document which he signed.

As to the other assignments of error which, in the discussion of this motion, we care to present, to wit, the 11th, 12th, 13th, 14th, 15th and 16th, we can not do better than to here insert the following from the brief of Messrs. Teller, Orahood and Morgan, counsel for plaintiff in error in the Circuit Court of Appeals below:

The eleventh assignment is to the instruction that—

"If there was a misunderstanding of the facts, whether the facts were wilfully misstated by the agent of the railway company or not, is not a material question, but the question is whether the facts were understood by both parties. Upon that the agent of the company says he only spoke in a general way of making a settlement."

As to this we say, since it is clear that the conversation here referred to is the one on the 2d and 3d of August, as no conversation about the settlement took place on the 4th, it is equally clear that this instruction is all wrong, since the "facts" spoken of are by the rest of the instruction seen to be the statement that "the mining company and not the railway company was liable to him for the injury." It is too clear to admit of discussion, that *that* statement was one of law and not fact, and hence, if the plaintiff relied on that statement, as he says he did (fol. 89), it was a reliance on a proposition of law and not a statement of fact, and as a result the instruction which treats of the statement as one of fact was error, and the plaintiff himself, relying on a statement of law, can not recover anything on that account. The same rule of law applies to this release as applies to any other contract or act done under or upon a mistake of law, and the authorities on that point are undoubted.

Elliott v. *Swartout*, 10 Pet., 150, 153;
Philadelphia v. *Collector*, 5 Wall., 731;
Sanborn v. *Co. Com.*, 97 U. S., 185;
R. R. Co. v. *Commissioners*, 98 U. S., 541;
Small v. *Ins. Co.*, 98 U. S., 85;
U. S. v. *Ames*, 99 U. S., 35–46;
Soutter v. *R. R. Co.*, 13 Wall., 517–524;
Little v. *Barnes*, 134 U. S., 547–554;
Regan v. *Baldwin*, 126 Mass., 485–487;
Bacon v. *Bacon*, 17 Pick., 134;
Needles v. *Bush*, 81 Mo., 509;
R. E. Institute v. *Linder*, 74 Pa. St., 131.

The twelfth error assigned is on the instruction that—

"If the jury believed that in talking about settlement, August 2d and 3d, the parties talked only in respect to his illness, doctor's bill and the like, and the loss of time for two weeks, then it would appear that *plaintiff*, at least, did not understand the subject-matter of *the negotiation and as to what is expressed in the release.* He says he did not read and could not read it without his spectacles, and that he did not have them at time the paper was given to him."

This was erroneous in any point of view—

1st. Because, as already *noticed*, *all* the talk on August 2d and 3d, the only time there was any talk whatever of the kind referred to, is conclusively presumed to have been merged in the instrument, and it can not be limited, qualified, or altered by parol proof, and the court erred in leaving any such questions to the jury. See—

Parsons, *715*, and authorities above cited.

2d. Because the court expressly decides and tells the jury what has been *proved*, when it says "that if they believe," etc., "then it would *appear* that plaintiff ***at least*** did not understand it, *because* he ***says he did*** not read it," etc. Suppose he did say so? Wood, the man who presented the paper, an apparently disinterested witness, swears that plaintiff did read the release, and read it carefully and asked questions about the distribution, etc. (fols. 47–50), and plaintiff himself admits he "took the paper and looked at it," nor did the plaintiff give as the reason he did not read that he had no spectacles. He says: "I looked at it; took it in my hand; looked at it; I could not read it; my hand was shaking —so." (Fol. 72.) This, upon direct examination. Then follows the testimony already referred to, in which witness was allowed to say he could not ***then*** read it, though admitting his eyesight was not as good then as a year before, and finally ending up with the question and answer already noticed as to whether he could have read it without spectacles, the plaintiff admitting, on cross-examination, however, that "he could see very well that it was a paper that had printing and writing on it." We submit that with this testimony of Wood that he did read it, and kept it in his hands for half an hour, and asked questions about the figures, etc., on it, corroborated, as it certainly is, by plaintiff's statement that it was his shaking hands and not want of glasses or eyesight that prevented him from reading what he could see was a written and printed instrument, the court clearly invaded the province of the jury in passing on a fact, and just as clearly made an erroneous finding when it found that plaintiff did not understand it, because he did not read the release.

The thirteenth and fourteenth errors assigned raise the same question, and are erroneous, because they state, as a rule governing a case like this, what is in direct and positive conflict with the holdings of every court in this country.

The statement is, that—

"One in the situation of plaintiff, lying on his bed, somewhat prostrated by the shock which occurred at the time of the accident, may be excused from reading 'it,' if he in fact did not read it," and again, "if he failed to read it under the circumstances disclosed he may be excused, because he was *in some pain*, *misery*, *and*, *perhaps*, *to some extent*, *under the influence of morphine*."

Now, what was the situation of plaintiff, and what were the "circumstances disclosed" by the evidence, which the court refers to as matters which excused the plaintiff from reading the release, and allows him to repudiate his act in signing it? Take the testimony of plaintiff and his doctor. He was injured July 30, 1894, in the afternoon. Dr. Hughes prescribed for him in the evening of that day. He describes his injuries thus:

"Found him suffering pain, but could get nothing intelligent from him; found a slight abrasion on the right side, above the hip, and the next day it turned black, and so continued for ten days; was about the size of witness' hand; gave hypodermic injection of morphine, one-quarter grain; afterwards gave another form of it, called 'Tully's Powder,' morphine and camphor; gave morphine and other remedies. The treatment of giving morphine *continued four or five days.* The next morning after the accident there was a slight trembling; attributed it to the shock and immersion in water. The shock proper *may* have lasted four or five days." (Fol. 27.)

On cross-examination he testified that at the time—

"He had not apprehended any serious consequences; that his judgment was that he would recover in two or three weeks. He gave a quarter of a grain of morphine that night, and probably a quarter of a grain three or four times after that, and an eighth of a grain six or seven times; morphine was the only opiate given; it would render him drowsy, not unconscious; the effect of an eighth of a grain would be very light—might produce nervousness and general disquiet." (Fol. 28.)

On this it is to be observed that, taking the longest time stated—in which plaintiff was given morphine, "four or five days"—he was not taking morphine at all on the 4th of August, and if the shorter time is taken he had not been taking it for two days at least. Nor is there any evidence, except that of the doctor, that shows any morphine taken after Monday morning, August 1, as neither Mrs. Harris or Mrs. Sherwood claimed to have seen any given, and Harris speaks only of that given on Monday.

One thing more is evident from all the testimony, viz., that Wood was with Harris, and the two were talking together from half an hour to two hours; Mrs. Sherwood, plaintiff's witness, says two hours, and she saw Wood come and go and was in the room when Harris signed (fols. 95-96), and Wood says that all their talk related to the release (fol. 50). In the evidence of Harris there is not *one word* that indicates that he was under the influence of opiates *when* the paper was presented, nor that he had taken any morphine since Monday, August 1. Nor is there any reference whatever, much less any averment, that he was then suffering much or little *pain* or anything of that *kind;* all that does appear is that he says he could not read the release because his hands shook so. The testimony of Wood (and he is the only one that speaks of it) is that plaintiff was "sort of half lying down" at time he presented the release. Now, upon what evidence can this instruction, which says that plaintiff "was lying on the bed somewhat prostrated by the shock which occurred at the accident," be based, when none of the witnesses, not even the plaintiff, testified about any shock or any prostration, and the only reference to any *shock* was that of Doctor Hughes, who says the shock proper "may have lasted four or five days" (fol. 27). "May" is not *must* in such a case, and this was the fifth day *after* the day of the accident. Again, by what court or text-writer has it ever before been stated as a rule of law that a party, having met with an accident five days before, even if in such dire distress as to be "lying on his bed somewhat prostrated by the shock of the accident," could, for that reason, excuse himself for signing, without reading, an instrument of that kind? When and by whom has it ever been held that a man may repudiate his written contract and be excused from reading it, and repudiate because not read; though holding it in his hands and talking about it for an hour or two, because at the time he was in "some *pain*, *misery*, and perhaps, to some extent, under the influence of morphine?" We assert that no such decision was ever before made by any court or even counsel. The statement itself is its own refutation. "Some pain and misery" is too indefinite, and too useless as a cause. Much pain and misery would not be sufficient, for only such pain and misery as would necessarily render a party incapable of understanding the force of his act would alone excuse the party in such a case. To instruct a jury—always as all courts are bound to take notice of—inclined to find for the plaintiff in cases like this, that "some pain and misery," a possible, "to some extent," influence of opiates, is enough to justify the party thus situated in signing one day and repudiating an instrument the next, is to overthrow and disregard every known rule of law relating to contracts and the presumptions that arise from their execution, and to give to a jury a right of finding a justification for not reading, and a right of repudiation in every case in which the party claims to have been in ill health. Nothing is plainer than that from the words, "*some* pain and misery," and "*perhaps* to some extent under the influence of morphine," is equivalent to saying, if you find he was *in any pain or* misery, or to *any* extent under the influence of morphine, you may find he was justified and excused from reading, for since there was nothing stated by which the amount of pain, etc., necessary to enable him thus to repudiate, the jury were at liberty to infer that the least amount would be enough.

The fifteenth error assigned is on an instruction that, "if the plaintiff understood (at time of signing release) it to be a settlement only for the expenses of his illness and the two weeks of time, and nothing more, the release would not be operative against him in respect to the damage sought in this action." That this is erroneous scarcely admits of discussion. The plaintiff had the release before him. He handled it, talked about it; knew that it contained written and printed matter; knew that he was getting $250, which he could get only by signing; knew that there had been no talk of or any demand on the company to a greater extent than $300 (fol. 45), and knew that it was a release of some kind, and, as he says, that at that time nothing was said about the contents of the paper; yet, because of a former talk, this plaintiff is *held* to be justified in not reading the release, and his understanding of it is to govern and determine his right, despite the fact that the other party to it understood it differently and as it was written. The law is, as we have already seen, that he who can read, and will not, shall be presumed to know what the writing contains. In the absence of fraud in procuring the deed, no one, under any authority that can be named, has the right to sign a release or other paper and then be allowed to say he did not understand it, and so escape its effects. Besides that, the instruction is in direct conflict with the law of interpretation of contracts, that all prior negotiations are merged in the contract when reduced to writing.

Again, the sixteenth error assigned, the court leaves it to the jury to say whether the plaintiff was in a state of mind and body to transact such business at time it was done, etc. We submit there is no evidence in this Record upon which the court was authorized to submit that general question, seeing all the evidence fails to show any incapacity of mind and body for the transaction of such business, for surely a man mentally clear and strong enough to remember and repeat clearly and explicitly what was said and done on that occasion, can not be held incapable of understanding his acts; and as for his body, if his hands shook, or could not read without spectacles, that is not enough, since he could have had it read to him, or could have put on his glasses. As to the mental state, the rule is that to set aside the act of a party thus signing an instrument on the ground of mental weakness or want of ability, it must be for *extreme* weakness of intellect.

Harding v. *Handy*, 11 Wheat., 103;
Allore v. *Jewell*, 94 U. S., 506–511;
Conley v. *Nailor*, 118 U. S., 133.

In *Johnson* v. *Harmon* (94 U. S., 371–379), it is said: "Imbecility of mind is not of itself sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life."

And here again we notice the *error* above alluded to, viz., in a court of law attempting to exercise powers that belong to a court of chancery only, and leaving to a jury what properly belongs only to the court, viz., the degree of mental or bodily weakness that would excuse a party from reading an instrument or that would be sufficient to set it aside. The question was for the court alone.

Harding v. *Handy*, 11 Wheaton, 103–125.

And, more than this, the rule is that capacity to contract is the rule, incapacity the exception, and so "capacity is held not only when there is no evidence against it, but *when* the *evidence or the rules or the argument leaves it in doubt.*"

2 Parson on Cont., *573.

In any view of the facts and the law, this instruction was erroneous, because it was for the court, and not for the jury, to find the amount of incapacity; and second, there was no sufficient evidence, in fact no evidence, upon which it could be submitted to the jury.

Lastly, the court erred in the seventeenth and eighteenth assignments, in charging that—

"The act of negligence of the servants of the mining company in not properly securing the car from running on to the main tract is to be ascribed to the defendant."

And also in charging that—

"The railway company, as to its passengers, is bound to keep its track clear from obstructions of this kind, to see that the cars which it uses on sidetracks, are secured in place so that they will not come upon the track."

That the negligence of a third person, not connected by the relations of agency of some kind, can be *ascribed* to a carrier, is a proposition that is, on its face, indefensible, and not sustained by any authority we have been able to find. (See notes to sec. 708 of Sherman & Redfield on Negligence.) It is true that carriers of passengers have been held liable for results that, *but* for the acts of third persons, would not have resulted; but always, and in every case, so far as we can discover, only upon the ground that some negligent act of the carrier had contributed in some more or less direct way to the result. *But* whether any act of the defendant had thus contributed, was a question for the jury; besides, it was not true, and no authority in the book or in reason can be found for saying that *one* man's negligence is to be ascribed to another; nor is it true, as a matter of law, that "a railway company, as to its passengers, were bound to keep its track clear of obstructions of this kind."

Were that instruction a true statement of the law, a railway company would be an *insurer* of the safety of the passengers. No court has ever yet held the rule stronger than that laid down by the United States Supreme Court, in *Phil. & R. R. R.* v. *Derby*, 14 How., 486, viz., that the carrier of passengers is held to "the greatest possible care and diligence." This rule was reaffirmed in the case of *Indianapolis*, *etc.*, v. *Horst*, 93 U. S., 291–295. But the court, in the latter case, adds that this—

> "Does not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from all possible peril, nor such as would drive the carrier from the business, *but* everything necessary to the security of the passenger reasonably consistent with the business of the carrier and the means of conveyance employed."

That is to say, the railway company is not *bound* to keep its track clear from obstructions, *but* bound to "use the highest possible care and diligence" in *doing so*.

Now, care and diligence, like negligence, are relative terms. What is care, and what is the highest possible care and diligence, depends upon many facts, and varies under different circumstances, and hence, whether the company had, in this instance, and in every instance of this kind, used the "highest possible care and diligence," was a question for the jury, and not for the court, and so we say the court clearly erred in not submitting it to the jury for their determination, and doubly erred in deciding the question for itself. And this is true whether the uncertainty comes from a conflict of the evidence or because of facts undisputed, from which fair-minded men will honestly draw different conclusions.

R. & D. R. R. v. *Powers*, 149 U. S., 43–45.

In reference to all of these instructions we submit there is not one to which we have excepted that is not, in terms, directly calculated to mislead the jury and prejudice it against the defendant, and in favor of the plaintiff, and that is especially true of those that relate to the execution of the release, since they are equivalent to saying to the jury that if the defendant attempted to settle a claim with plaintiff while he was suffering *pain*, the plaintiff could sign any release he saw fit and be allowed to repudiate it because he was suffering some pain, and that is calculated to prejudice the jury against the defendant, who should thus, five days after the accident, attempt to settle a claim with a man in such a state. The rule as to instructions and error therein is that the court is bound to instruct on every point of law relevant to the issue, if so requested.

Douglass v. *McAllister*, 3 Cranch, 298 ;
Smith v. *Carrington*, 4 Cranch., 60–62 ;
Express Co. v. *Kountze*, 8 Wall., 353 ;
Pitts v. *Whitman*, 2 Story, 620 ;
Nudd, etc., v. *Burrows*, 91 U. S., 439 ;
Ry Co. v. *McCarthy*, 96 U. S., 265.

" When the case is close and the evidence very evenly balanced, the instructions must be *full and accurate.*"

Ill. R. R. Co. v. *Stafford*, 67 Ill., 431.

And—

" In all cases where this has not been the character of the instructions, the appellate court will always reverse."

Andrews v. *Ketchen*, 77 Ill., 377 ;
Richardson v. *McNulty*, 24 Cal., 339 ;
Wabash R. R. Co. v. *Heuks*, 91 Ill., 406.

In conclusion, we think we have shown, both by authority and on reason, that the rulings and ultimate judgment of the court was erroneous, and was arrived at by errors that inevitably worked to the injury of the defendant, and that the judgment should be reversed.

In view of what has been gone over, touching the alleged errors occurring in the trial below, we submit that it is not too much to say that the errors were such as will probably reverse the judgment of the court below, and that, *a fortiori*, they are more than sufficient to conclusively show that this is not a case where the judgment below can be, on this motion, affirmed, because this writ of error has been sued out, manifestly, only for purposes of delay or because this appeal is shown to be frivolous.

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For Plaintiff in Error.

WASHINGTON, D. C.,
April 12, 1895.